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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR, *Petitioner*,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on April 21, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

OPINION BELOW

The opinion of the court below is reported at 25 App. Div. 2d 322, 269 N.Y.S. 2d 163.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The order of the Appellate Division was entered on April 21, 1966. On July 7, 1966, the Court of Appeals of the State of New York entered orders denying petitioner leave to appeal and dismissing the appeal taken as of right from the order of the Appellate Division of April 21, 1966.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination forbids disbarment of an attorney on the basis of charges with respect to which his testimony was compelled under a grant of immunity.

2. Whether disbarment may be imposed upon an attorney as an additional punishment for a conviction for criminal contempt and, if so, whether such disbarment violates due process where the criminal contempt hearing was before the judge who preferred the charges and who presided at the trial at which the alleged contempt occurred and where the attorney was required to defend against the charges without an opportunity to obtain other counsel when retained counsel was permitted to withdraw because of the denial of an adjournment.

3. Whether there is a denial of due process when criminal charges not related to the practice of law are made the basis of disbarment without the safeguards of a criminal trial.

4. Whether there is a denial of due process when a charge of conspiracy to obstruct justice is sustained without a finding of conspiracy but only a finding of a purpose to obstruct justice by a false statement to an assistant district attorney.

5. Whether in this case the punishment of disbarment is so unreasonable in relation to the conduct charged and so unrelated to the legitimate interests of the State in regulating the practice of law as to constitute a deprivation of due process.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V.

No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

United States Constitution, Amendment XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Section 750, Judiciary Law of New York (McKinney's "Consolidated Laws of New York Annotated"): Power of courts to punish for criminal contempts:

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. * * *

Insofar as here pertinent, Sections 886 and 901 of the New York City Charter provided:

886: (1) No officer * * * whose salary is payable in whole or in part from the city treasury shall * * * accept any gift, loan or thing or promise of value from any person, firm or corporation interested directly or indirectly in any manner whatsoever, in or in the performance of * * * any contract, work or business or the sale or acquisition of any property, the expense, price or consideration of which is payable from the city treasury * * *.

901: Any officer or employee of the city who shall knowingly * * * accept or receive any gratuity from any person whose interests may be affected by his official action shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment.

STATEMENT OF CASE

1. INTRODUCTION

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on November 4, 1935. On April 21, 1966, in disciplinary proceedings brought by the Association of the Bar of the City of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, entered an order of disbarment which the New York Court of Appeals declined to review on July 7, 1966. One of the grounds for disbarment was petitioner's criminal contempt conviction which was affirmed by this Court in *Ungar* v. *Sarafite,* 376 U.S. 575.

The charges filed by the Bar Association in the disciplinary proceedings have their background in advances of approximately $4,000 made by petitioner in February, March and April of 1958 to pay for remodeling the apartment of Hulan E. Jack, then President of the Borough of Manhattan. In December 1959, after an investigation, the District Attorney's office presented the matter to the Grand Jury. Jack was indicted on charges relating to these advances and, after a jury disagreement in the first trial, was convicted in a second trial. On charges based on statements made while testifying in the second Jack trial, petitioner was thereafter convicted for criminal contempt.

The charges in the disciplinary proceeding involve the advances made in 1958, the investigation by the prosecuting attorney of these advances and related circumstances, the grand jury investigation, petitioner's testimony in the Jack trials, and the hearing and other proceedings relating to his conviction for criminal contempt. The specific charges

were: (1) as a result of conduct in the second Jack trial, petitioner "was found guilty of criminal contempt of court;" (2) during the course of the trial, he "shouted at the court * * * in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence' "; (3) he "aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter" by making certain payments for Jack's benefit; and (4) he conspired with Jack "to obstruct justice and the administration of the New York City Charter * * * in violation of Penal Law, Section 580" by concealing these payments.

An appropriate account of the extensive background of the charges and of the proceedings, evidence, and findings in the disciplinary hearing for presentation of the constitutional issues submitted by this petition necessitates a lengthier recital of facts than is ordinarily warranted.

2. EVENTS PRIOR TO JACK TRIALS

The Referee in the disciplinary hearings found that petitioner and Jack, as well as their wives, had been close personal friends for many years prior to 1958;[1] that they visited in each other's homes, went on vacations together, belonged to the same political club for years, attended political conventions together, and even shared the same suite (R. 50).[2] Petitioner played an active role in Jack's being named Democratic leader of his district and in his

---

[1] According to the testimony, this was about 20 years (Tr. 1610). "Tr." references are to the pages of the transcript of testimony before the Referee in disciplinary proceeding.

[2] The Referee's report is reprinted as an Appendix to the "Memorandum on Behalf of the Association of the Bar of the City of New York" filed in the Appellate Division in support of the report. "R." references are to the pages of the Referee's report in this appendix which has been included in the record of proceedings transmitted to this Court.

election in 1953 as President of the Borough of Manhattan (R. 50).

On a number of occasions, after Jack's election as Borough President in 1953, petitioner and his wife, as well as Mrs. Jack, urged Jack to have his apartment refurnished and redecorated (R. 50). After his re-election in November 1957, the subject was discussed again. For a number of years petitioner had been actively engaged in the real estate business in which he had employed a contractor, Bechtel, and it was thought that if petitioner "negotiated the job with Bechtel, and made the payments therefor to Bechtel, the work could be done at a minimum cost" (R. 51). Accordingly, petitioner arranged for Bechtel to do the redecorating work for approximately $4,000 which, with new furnishings, brought the total cost to about $15,000 (R. 53-54). Jack's resources were limited to approximately $12,000 and petitioner offered to pay Bechtel and to accept repayment when Jack was able (R. 51, 54). Bechtel thereafter did the work and was paid by petitioner during the months of February, March and April 1958 (R. 38).

In 1959 petitioner became involved in a controversy with the *New York Post* and brought a libel action for publication of the charge that he was a "slumlord". Thereafter, on December 7, 1959, Bechtel told a *Post* reporter that petitioner had paid for the work on Jack's apartment. At a meeting on December 9th, attended by petitioner, Jack, and others, to avoid publicity that Jack thought would be embarrassing to him, petitioner agreed, at Jack's request, to state that Bechtel had been paid by Jack if there was newspaper publicity. The Referee found that publicity was the only subject discussed at the meeting which resulted in this agreement and that no one thought of any criminal investigation. (R. 67-72.)

On December 11, 1959, petitioner telephoned Assistant District Attorney Scotti to file a complaint against the *New York Post* in connection with an attempt to place an

illegal listening device in Bechtel's apartment. Scotti was unavailable but telephoned petitioner's partner later that afternoon and stated he would like to talk to petitioner who then went to Scotti's office. While petitioner was at the District Attorney's office, the *Post* reporter who had spoken to Bechtel telephoned Scotti twice. During their conference, Scotti advised petitioner of a complaint by the *Post* that petitioner had charged personal expenses to one of his wholly owned corporations. Petitioner pressed his complaint against the *Post* which Scotti appeared unwilling to entertain, a heated argument ensued, and when petitioner started to leave, Scotti called him back for the stated purpose of considering petitioner's complaint against the *Post*. Scotti then asked petitioner to answer a few questions so that he could "get the whole picture" and petitioner's discussion of the contract with Bechtel was the first reference to Jack. Thereafter, in response to a question by Scotti, petitioner denied that he had paid for the work because, as he testified, he did not want this information relayed to the *Post* reporter who had been telephoning Scotti. Petitioner testified that when he learned of the grand jury investigation, he decided to abandon the publicity cover-up and on Monday morning, December 14, 1959, before the convening of the Grand Jury, advised an assistant district attorney of the facts (R. 79-82).

On Tuesday, December 15, petitioner appeared before the Grand Jury, asserted his constitutional privilege against self-incrimination, was directed to testify, was granted immunity from prosecution for any criminal offenses disclosed in his testimony, and testified for ten days. Thereafter, Jack was indicted and tried on three counts of violating conflict-of-interest provisions in the New York City Charter and one count of conspiracy to obstruct justice. Petitioner was named as co-conspirator but not a defendant.

3. JACK TRIALS

The first trial, in which petitioner testified for six full days, ended in a jury disagreement. In the second trial, Jack was convicted of two charges based on Section 886 (now 1106) of the City Charter prohibiting the acceptance by an employee of anything of value from any person interested in any business with the City and of the charge of conspiracy to obstruct justice. He was acquitted of the charge based on Section 901 (now 1121) of the City Charter involving the receipt of "any gratuity from any person whose interests may be affected by his official action".

Petitioner's testimony in the second trial was circumscribed to three days (C. 80-442).[3] Although not a defendant, petitioner's professional integrity and business reputation were involved since he had been named as a co-conspirator, and he was interested in presenting a complete picture of all the pertinent facts.[4] Although called by the

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[3] Petitioner's testimony in the two Jack trials was introduced by the Court as exhibits in the contempt proceeding (C. 54). The Record on Appeal in the contempt proceeding, which included this testimony, was introduced as an exhibit in the disciplinary proceeding. "C." references are to the pages of this Record on Appeal which has been included in the record of the present proceeding transmitted to this Court.

[4] Events proved that in reality petitioner was on trial in a very practical sense. Although immunity had been granted to obtain petitioner's testimony, eventual disbarment of petitioner through the conviction of Jack was clearly in the mind of the prosecuting attorney in the Jack trials. Thus, in concluding petitioner's direct examination, he put the following question (C. 321):

> Q. Now you appreciate, do you not, Mr. Ungar, that while you received immunity from prosecution for whatever crimes you might have disclosed in the course of your testimony, you do not receive immunity from any disbarment proceeding that may be instituted against you.

The conviction of Jack was the basis of charge III in the disciplinary proceeding that petitioner aided and abetted Jack in violating sections of the New York City Charter.

prosecution, he was treated by the prosecutor as a hostile witness from the very inception of his testimony.[5] Petitioner found single-word answers to the prosecuting attorney's carefully tailored questions incompatible with an accurate portrayal of the situation and his attempts to respond with fuller explanations met with strong admonitions by the court (C. 187-191, 203-207, 279-281). On his third day of testimony, petitioner testified that on the morning of December 12, 1959, after his interview with Scotti the previous afternoon, he told Jack of the grand jury investigation. When questioned by the prosecuting attorney concerning Jack's reply, petitioner answered that this was only a small part of what he had told Jack.[6] The prosecutor's motion to strike this answer was granted and he repeated the question. Petitioner replied (C. 302-303):

> A. He didn't respond to just one simple statement. It was part of a conversation, and I can't distinguish one sentence from another in a half-hour conversation the full details of which I don't recollect.

---

[5] Before he appeared as a witness in the second trial, petitioner had delivered to the Court papers designated "Notice of Motion, Affidavit and Exhibits" which requested, among other things, that he "be considered as if he had been called by the Court" and "be given the protection of the Court" against objectionable questions "by either the District Attorney or Defendant's counsel" (C. 79). The Court stated, "I am not treating it as a motion" but as "addressed to the Court in camera", denied the request as without merit, and emphasized "that these papers shall not be deemed a public record" (C. 79-79a). When defendant's counsel, upon whom a copy had been served, advised the Court that a newspaperman had borrowed his copy, the Court advised him to "communicate with that newspaperman immediately and ask for the return of the paper" (C. 79a).

[6] In the first trial, petitioner gave the full conversation which the prosecuting attorney apparently did not want disclosed to the jury in the second trial.

On its own motion, the Court ordered this answer stricken and began to admonish the witness (C. 303).[7]

Petitioner requested a recess stating he was too nervous and upset to testify and that he was unable to testify because he was being pressured and coerced and intimidated into testifying (C. 303-304). Petitioner requested the right to have counsel, stating that he was being badgered by the Court and by the District Attorney (C. 304). After further discussion, the following colloquy occurred (C. 305-306):

> The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.
>
> I ask for the privilege of leaving the stand, your Honor.
>
> The Court: No, you will remain on the stand.
>
> The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.
>
> The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.
>
> The Witness: I would like to leave the stand, your Honor.
>
> The Court: No, you may not leave the stand.
>
> (Whereupon, there was a further brief interval of silence in the courtroom.)

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[7] The judge, who had also presided at the first trial, had formerly been a member of the District Attorney's office and had been the prosecuting attorney's immediate superior for approximately 15 years.

After the Court directed the prosecuting attorney to proceed, the following occurred [C. 306]:

> The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.
>
> The Court: You are not only contemptuous but disorderly and insolent.
>
> The Witness: I have asked for the privilege of leaving the stand for five minutes.
>
> The Court: Put your question, Mr. Scotti.

The prosecuting attorney put a further question to petitioner who stated that he was unable to answer any questions, that he could not think clearly, and that he was an emotional wreck; he renewed his request for a recess "so that I can contain myself" (C. 307). When the question was put to him again by the prosecuting attorney, he remained silent (C. 307). The court then advanced the luncheon recess (C. 307).

After the jury retired, Jack's attorney requested the court to appoint a doctor to examine petitioner in view of his statement that he was emotionally or mentally incapable of testifying. Petitioner joined in the request for a medical examination. The court stated (C. 308):

> In my judgment, this is as near as malingering could ever be determined, from my observation.

The Court took two short recesses, then reserved decision on the request for appointment of a doctor until after the luncheon recess (C. 309-310).

After the luncheon recess, petitioner reported to the court that he had gone to a hospital, received an injection, "and I think that I can proceed temporarily, in addition to the pills I have taken this morning." (C. 311.) The direct examination of petitioner proceeded thereafter without further incident. In response to a subsequent question by the court, petitioner stated (C. 326):

> I said I thought I could go on because I had an injection. I took a number of pills this morning and last night.

At the conclusion of petitioner's testimony, the Court stated (C. 442):

> Now, Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time.

Subsequently, Jack's counsel noted there had been no ruling on his motion of November 25th for a medical examination of petitioner with respect to his outburst on the morning of that day, and observed that petitioner, after stating that he had received an injection and taken some pills, answered questions in an uninteresting, docile-like manner. Apparently accepting his explanation that he had been under medication, the Court referred to petitioner's statement that during the luncheon recess he had received an injection and "thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed". The motion for a medical examination was denied. (C. 443-444.)

4. THE CONTEMPT PROCEEDING

Two days after the conclusion of the Jack trial, on Thursday, December 8, 1960, at about 5 p.m., the trial judge caused to be served on petitioner an order to show cause citing him for contempt returnable on Tuesday, December 13, 1960, at 10 a.m. The charge contained 13 recitals of

events other than the outburst of November 25th and consisted of 31 pages of the printed record (C. 11-43). The short period allowed to respond to the charges included the intervening Saturday and Sunday during which a 17-inch snowstorm fell, paralyzing the City and traffic on Sunday and Monday. Petitioner retained counsel on Saturday by telephone, but did not consult with him because of the weather and his engagement in another trial. On the return day, counsel's request for an adjournment of one week on the grounds that he needed time to prepare a defense and was then engaged in a trial was denied.[8] Upon the denial of an adjournment, counsel withdrew, leaving petitioner without representation. (C. 45-53.) The judge, who preferred the charge of contempt and who presided at the trial on the charge, then proceeded with the contempt hearing and personally introduced all the evidence against petitioner. His directions to the Clerk with respect to the evidence were as follows (C. 53-55):

> **The Court: Now let's proceed.**
>
> In this proceeding, in the Matter of the Criminal Contempt of Sidney J. Ungar, I direct the Clerk to mark in evidence as one exhibit the following papers referred to on Page 3 of the order to show cause, to wit, a letter dated November 15, 1960, from the respondent, addressed to the Court, with two enclosures

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[8] Rule VII of the Rules of the Court of General Sessions of the County of New York states:

> No adjournment of the trial shall be granted by reason of engagement of counsel * * * unless it be made to appear by affidavit that counsel * * * is actually engaged in the trial of a case * * * *in which event the trial of the action shall be passed* for the day or until such argument or trial is concluded * * *.

See also, *Matter of Rotwein*, 291 N.Y. 116; *People* v. *McLaughlin*, 291 N.Y. 483; *People* v. *Koch*, 299 N.Y. 378, 381; *People* v. *Gordon*, 262 A.D. 534, 536.

being copies of two other letters, one dated September 29, 1960, and the other October 4, 1960, together with the envelope in which these documents came.

Please mark that.

The Clerk of the Court: Court's Exhibit No. 1, your Honor.

* * *

The Court: I direct the Clerk to mark, as Court's Exhibit No. 2, the minutes of the testimony of the respondent in the first trial of the indictment in the case of the People of the State of New York v. Hulan E. Jack, which was tried from June 9, 1960 to July 6, 1960.

That will be deemed marked Court's Exhibit 2 in Evidence.

* * *

The Court: Next I direct the Clerk of the Court to deem marked the minutes of the testimony of the respondent in the second trial of the People of the State of New York against Hulan E. Jack, which was conducted from November 15, 1960 to December 6, 1960.

* * *

The Court: Now that completes the proceedings so far as the Court is concerned.

The Court then called upon petitioner to answer the charges. Petitioner objected to going forward at that time, stating (C. 58-61) that he had "had no opportunity at all to prepare, to answer a thiry-page specification, which was served upon me Thursday afternoon at 5:00 p.m.", that he was "entitled to a reasonable opportunity to obtain counsel and secure and prepare a defense" and that he would "be prepared to answer the Court's charges at a proper hearing, if the Court will give me such an opportunity, because I am satisfied in my mind and in my conscience that I can establish, with adequate opportunity, that I did not

commit any contempt of court." His request for an adjournment was denied and the hearing was concluded without petitioner's being able to present any evidence in his defense.

In a statement before announcing its decision, the Court acknowledged "without going into the merits of any claim of illness being responsible for the conduct," that petitioner "while on the stand, was laboring under a nervous strain" (C. 63-64). The Court then found petitioner guilty of contempt for his statement to the Court on November 25, 1960, imposed a fine of $250, imprisonment for ten days, and commanded the Sheriff "to receive the said Sidney J. Ungar into custody and to detain him in the civil jail in the County of New York until the judgment of this Court is satisfied" (C. 64, 66-67). Petitioner's request for a stay of execution to permit an application to the Appellate Division for either bail or parole was denied (C. 66).

Because the contempt finding was based only on the November 25 incident, petitioner requested an opportunity (C. 67) "to submit medical proof this afternoon at two o'clock from a doctor and a hospital to show that those remarks were made under emotional strain and stress and were incurred because of the Court's repeated refusal to grant me a recess and an opportunity to leave the stand * * * there were at least three or four times before this remark was made in which I begged the Court repeatedly to please give me a recess because I was too upset and nervous to continue * * *."[9] This application was denied.

---

[9] The Appellate Division apparently overlooked this statement, as well as his statement in the second Jack trial as to his emotional upset and having taken a number of pills the morning and evening immediately preceding the utterance in question, when it commented in its opinion confirming the Referee's report that petitioner's claim that medication contributed to an overwrought emotional condition "was first advanced by respondent four years after the event".

The contempt conviction was affirmed by the Appellate Division on Tuesday, April 3, twelve days after submission of the appeal to it on March 22. The New York Court of Appeals affirmed but wrote the following memorandum:

> However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should, where disposition of the contempt charge can be withheld until after trial, and where it is otherwise practicable, order the contempt proceeding to be held before a different judge.

This Court affirmed, by a divided Court, holding that there was no deprivation of due process either in the contempt charge being tried by the judge who made the charges or in his refusal to grant an adjournment to permit petitioner to retain counsel and prepare a defense. *Ungar* v. *Sarafite*, 376 U.S. 575.

5. DISCIPLINARY PROCEEDINGS

The Bar Association petition which initiated the disciplinary proceedings was submitted on September 25, 1962, after affirmance of the contempt conviction by the Appellate Division but before the decisions of the Court of Appeals or this Court. Petitioner's answer to the charges dated November 29, 1962, admitted his conviction for criminal contempt and his making the statement upon which the conviction was based, but denied that he had been guilty of any professional misconduct or that his conduct justified the conviction. He denied the other charges. Among several affirmative defenses, petitioner claimed that the charges of aiding and abetting Jack in the City Charter violations and of conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law because his testimony with respect to these matters before the Grand Jury had been

obtained under a grant of immunity. The Appellate Division struck petitioner's affirmative defenses as insufficient in law and denied petitioner's motion for leave to appeal from this order to the Court of Appeals. On December 18, 1962, the Appellate Division appointed a Referee to take testimony with respect to the charges and to report. Hearings were continued to May 19, 1964, pending the decision of the Court of Appeals and this Court on the criminal contempt appeal. The Referee filed his report on April 2, 1965.

The Referee found charge I relating to the conviction of criminal contempt "established as a matter of law." With respect to charge II, relating to the November 25 statement which was the basis of the contempt conviction, petitioner presented evidence that he was so mentally and physically upset at the time that his remarks were involuntary and unintentional. He testified that on November 24 he had been given a prescription by his physician. The physician had died about two years before the hearing (Tr. 1962) and the pharmacist who filled the prescription testified from his records that he delivered the prescription for pills to petitioner on November 24, 1960 (Tr. 1837). The manufacturer's literature which the witness produced stated that patients "occasionally become agitated during the therapy and that hypermanic and manic episodes may occur occasionally during the therapy" (Tr. 1843). Petitioner testified that he had taken three pills during the morning of November 25th and, at the point of the trial involved in the contempt conviction, that his heart had began to pound and he was shaking from head to foot (Tr. 1966-1968). He further testified that Francis X. Clark, an assistant district attorney who was present at the trial, had just recently told him that he remembered that petitioner was "upset, nervous and excited" and that he was "still shaking" at the lunch recess. When called by petitioner as a witness, however, Clark testified that although petitioner was "apparently upset" he believed his conduct a deliberate act

(Tr. 1669).[10] The Referee's conclusion with respect to charge II was as follows (R. 110-111):

> Respondent admits having uttered the language attributed to him in the charge, as amended, and that he shouted it at the Court, while the Court was in session, and in the immediate hearing and presence of the jury. *The charge is, accordingly, admitted, and in my opinion respondent has not presented any justification or adequate excuse, mitigation or extenuation.* [Emphasis supplied.]

Charge III, which related to aiding and abetting Jack in violating New York's Charter provisions, involved two matters of business claimed to be pending before the city at the time of petitioner's advances for Jack. Petitioner denied any interest in business with the city at the time he made the payments and asserted that he did not intend to and did not in fact influence Jack's official action. The alleged business with the city was (1) a lease of space by the City in a building located at 299 Broadway owned by a corporation in which petitioner had a 10% interest, and (2) the Riverside-Amsterdam project, a proposed Title I project under the United States Housing Act, which a corporation in which petitioner had a 19% ownership was interested in sponsoring. The Referee found that the 299 Broadway lease had been approved by the City before petitioner "even discussed with Jack the matter of financing the improvements in Jack's apartment" and that the charge had not been sustained as to this transaction,[11] but that it had been sustained as to the Riverside-Amsterdam Project on the basis of the following facts.

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[10] Clark testified that he had spent about six days in preparing the contempt specifications under Judge Sarafite's direction (Tr. 1670).

[11] Jack had been convicted of a Charter violation with respect to this transaction.

Petitioner submitted to the Director of the Slum Clearance Committee of the City of New York, of which Robert Moses was Chairman, a plan which received the preliminary approval of Jack as Borough President in 1956. On October 9, 1956, the Slum Clearance Committee accepted petitioner's proposal as the highest bidder, subject to approval by the United States. In the summer of 1957, the project was suspended because of general policy questions relating to the entire Title I program and petitioner was advised in the fall of 1957 that the sponsorship of the project was to be reviewed when these policy questions were resolved. In July 1958, petitioner's sponsorship was reconfirmed by the Slum Clearance Committee. In February 1959, the project was to appear on the Board of Estimate's calendar for preliminary approval without any designated sponsorship, but as a result of the *Post's* characterization of petitioner as a "slumlord", the matter was adjourned. After further adjournments, it was laid over indefinitely in April 1959 and in December 1959 the Board of Estimate referred the matter back to the Planning Commission. Jack supported these adverse actions (Tr. 1863-1864). The project has never been acted on. (R. 42-46.)

The Referee's report described discussions of petitioner with Jack in 1956 and after July 1958. It does not state, however, nor was there any testimony that in the intervening period Jack and petitioner had any conversations or contacts with respect to the matter or that anything was pending before the Board of Estimate or before Jack. Although the project had been suspended in the summer of 1957 and apparently remained dormant until July of 1958, during which time the arrangements for and the actual advances were made, the Referee found charge III sustained because in the period from 1956 to 1959 petitioner "was a person doing business with the City of New York, and interested in City contracts, within the meaning of

Sections 886 and 901" (R. 46-47, 49-50).[12] The Referee made no finding that petitioner influenced or attempted to influence Jack, holding that violation of the Charter provisions did not depend on any intent to influence, the actual influence of official action, or any evil motive (R. 38-39).[13]

The charge of conspiracy to obstruct justice and the administration of the New York City Charter (charge IV) was held established without a finding of conspiracy, on the ground that petitioner "for the purpose of obstructing" the administration of justice had made a misstatement to Assistant District Attorney Scotti.[14] This misstatement referred to the denial on Friday afternoon, December 11, 1959, of petitioner's payment on behalf of Jack which he corrected on the following Monday before the grand jury had been convened. This misstatement followed the meeting of Wednesday, December 9th, at which the story that Mrs. Jack had paid Bechtel was agreed upon solely for publicity purposes. The Referee found (R. 72):

> There was no mention of, or reference to, the District Attorney, or to the possibility that any crime was involved, or to any grand jury investigation, and there is nothing to indicate that up to this time, at least, anyone thought that the transaction between respondent

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[12] Although the charge sustained was that petitioner aided and abetted Jack in violating Secs. 886 and 901 of the New York City Charter, Jack had been acquitted of the charge of violating Section 901.

[13] In the trial of Jack, the prosecuting attorney stated: "This case does not involve an exercise of influence" (C. 346).

[14] The Referee's report stated (R. 95):

> In my opinion, respondent, for the purpose of obstructing and defeating the administration of justice, willfully and knowingly gave Assistant District Attorney Scotti false information concerning important and material facts involved in a grand jury investigation. Consequently, in my opinion, this charge has been established.

and Jack might result in any criminal investigation, proceeding or prosecution.

There is no evidence, and no suggestion by the Referee, of any subsequent agreement to tell this story for any other purpose when petitioner, on Friday, December 11th, denied to Assistant District Attorney Scotti that he had made the payments for Jack.

In challenging the Referee's report before the Appellate Division, petitioner, among other things, claimed a violation of due process in the charge of aiding and abetting the violation of Section 886 and Section 901 of the City Charter and in the Referee's sustaining the charge of conspiracy to obstruct justice and the administration of the New York City Charter on the basis of an individual misstatement to an assistant district attorney without a finding of conspiracy. Without discussing the legal or constitutional issues, the Appellate Division confirmed the Referee's report and, without relating any specific charge or charges to its conclusion, concluded that petitioner's "conduct, activities and methods were clearly in violation of the ethical standards required of members of the Bar" and that he should be disbarred.

Petitioner's appeal as of right and motion for leave to appeal to the Court of Appeals, urged a denial of due process on the grounds (1) that the hearing in the criminal contempt conviction did not meet proper standards for the serious punishment of disbarment, (2) that the statutes upon which the disciplinary charges were based, namely, Sections 750 and 751 of the judiciary law, Sections 886 and 901 of the New York City Charter, and Section 580 (conspiracy) of the penal law, as construed and applied, were unconstitutionally vague, (3) that the drastic order of disbarment did not bear a reasonable relation to the State's legitimate objectives in regulating the practice of law, and (4) that the charge of conspiracy to obstruct justice and

the administration of the City Charter was sustained without any finding of conspiracy. Since obstruction of justice, in the absence of conspiracy, had not been defined as a crime, under New York Law, violation of the constitutional *ex post facto* prohibition was also claimed. The Court of Appeals denied petitioner's motion for leave to appeal and dismissed the appeal on the ground "that there are no substantial constitutional questions directly involved."

REASONS FOR GRANTING THE WRIT

The Appellate Division confirmed the Referee's findings sustaining all four charges and, stating that petitioner's "conduct and activities and methods were clearly in violation of the ethical standards required of members of the Bar," concluded that he should be disbarred. "Since the Appellate Division in its opinion did not explicitly discriminate among the grounds upon which its disbarment order was based" (Memorandum of Mr. Justice Harlan on granting stay, September 30, 1966), it is impossible to determine whether it regarded each charge as sufficient to justify disbarment or whether disbarment was decreed because of the combined weight of the four charges and, consequently, whether the elimination of any charge would have produced a different result. It must be assumed, therefore, that each charge was necessary to the result reached. Consequently, the violation of constitutional standards with respect to any charge requires reversal.

Petitioner claims (1) infringement of the Fifth Amendment privilege against self-incrimination by the filing of disciplinary charges based on matters with respect to which his testimony before the grand jury was compelled by a grant of immunity; (2) violation of procedural due process (a) in predicating the serious punishment of disbarment upon the criminal contempt conviction in which the hearing satisfied due process only for purposes of a minor punishment, (b) in basing disbarment upon a charge of

criminal conduct unrelated to the practice of law without the procedural safeguards of a criminal trial, and (c) in sustaining as proved a charge of conspiracy without a finding of conspiracy; and (3) violation of substantive due process in imposing the severe punishment of disbarment for the charges sustained.

1. DISCIPLINARY CHARGES BASED UPON MATTERS CONCERNING WHICH PETITIONER TESTIFIED BEFORE GRAND JURY UNDER GRANT OF IMMUNITY VIOLATE SELF-INCRIMINATION PRIVILEGE.

The disciplinary charges relating to aiding and abetting Jack's violation of the City Charter and to conspiracy to obstruct justice involve the same subject matter with respect to which petitioner testified under a grant of immunity before the grand jury and in the Jack trials. In reviewing his contempt conviction, this Court in *Ungar* v. *Sarafite*, 376 U.S. 575, 576, stated that petitioner "was an important prosecution witness * * * and immune from prosecution for his testimony on these matters before the grand jury."

Malloy v. *Hogan*, 378 U.S. 1, 8, held that "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement". Petitioner contends the penalty of disbarment is equivalent to a criminal punishment and, therefore, the Fifth Amendment's privilege against self-incrimination prevents the matters with respect to which he testified under a grant of immunity from being the basis for disbarment.

This Court's recognition of the severe consequences of disbarment justifies its treatment as criminal punishment for purposes of the self-incrimination privilege. The Court has held other civil forfeitures to be within the privilege (*Boyd* v. *United States*, 116 U.S. 616; *Lees* v. *United States*, 150 U.S. 476; cf. *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701) and disbarment to be punish-

ment for purposes of the Constitution's bill of attainder and *ex post facto* prohibitions. *Ex Parte Garland,* 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings* v. *Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); cf. *United States* v. *Lovett,* 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States* v. *Brown,* 381 U.S. 437 (disqualification from holding union office held punishment).

The punitive effects of disbarment were described in *Bradley* v. *Fisher,* 13 Wall. 335, 355:

> To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family.

In *Ex Parte Wall,* 107 U.S. 265, 318, the dissenting opinion of Mr. Justice Field asserted that "To disbar an attorney is to inflict upon him a punishment of the severest character." Disbarment was more recently characterized in Mr. Justice Black's dissent in *Cohen* v. *Hurley,* 366 U.S. 117 at 147, as so severe as to entitle a lawyer to "the full benefit of the 'law of the land' ". In dissenting opinions, Mr. Justice Douglas stated in the same case (pp. 153-154) that "Taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so" and in *Ullmann* v. *United States,* 350 U.S. 422, 440-441, that "disabilities imposed by federal law [such as "ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment"] are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself."

The severe effects of disbarment which have been recognized in the opinions of this Court and its members for more than a century justify a determination that it is punishment to which the privilege against self-incrimination of the Fifth Amendment is applicable.

The privilege has been construed to permit incriminating testimony to be compelled by the removal of the possibility of incrimination through a grant of immunity. *Brown* v. *Walker,* 161 U.S. 591; *Ullmann* v. *United States,* 350 U.S. 422. The immunity granted, however, must be co-extensive with the scope of the privilege and testimony may be refused where it is not. *Counselman* v. *Hitchcock,* 142 U.S. 547. A witness has "a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks,* 383 U.S. 234, 246. Thus, a State by granting immunity cannot compel a witness to give testimony which would incriminate him under Federal law. *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 54.

When petitioner invoked his privilege, immunity was granted to compel his testimony. The grant of immunity obviously carried the implied threat that any further refusal to testify would subject him to punishment for contempt. To justify this compulsion, however, it was necessary for the immunity to encompass all areas of incrimination including disbarment. If the immunity did not extend to disbarment because of limitations in statutory authority or for other reasons, the matters disclosed were improperly compelled and unavailable to the State for any incriminating purpose. For the privilege not only protects the refusal to give self-incriminating testimony but also forbids the use of such testimony improperly obtained by any form of compulsion. *Boyd* v. *United States,* 116 U.S. 616; *Bram* v. *United States,* 168 U.S. 532; *Wan* v. *United States,* 266 U.S. 1, 14-15; *Adams* v. *Maryland,* 347 U.S. 179; *In re*

Groban, 352 U.S. 330, 334; *Haynes* v. *Washington*, 373 U.S. 503; *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57; *Schmerber* v. *California*, 384 U.S. 757; *Miranda* v. *Arizona*, 384 U.S. 436; *United States* v. *Blue*, 384 U.S. 251, 255. Disciplinary charges based on the subject matter of petitioner's testimony, therefore, violated the privilege against self-incrimination.[15]

2. PROCEDURAL DUE PROCESS WAS VIOLATED BY UPHOLDING AS BASIS OF DISBARMENT (A) CRIMINAL CONTEMPT CONVICTION WITHOUT APPROPRIATE HEARING, (B) CRIMINAL CHARGE OF AIDING AND ABETTING VIOLATION OF CITY CHARTER WITHOUT SAFEGUARDS OF CRIMINAL TRIAL, AND (C) FINDING OF OBSTRUCTION OF JUSTICE WITHOUT PROPER NOTICE OF CHARGE.

A. Criminal Contempt Conviction.

Petitioner's conviction of criminal contempt, for the reasons previously stated, must be considered here as a necessary basis for the disbarment order. Since this charge was considered "established as a matter of law" without further hearing in the disciplinary proceeding and thus automatically provided grounds for disbarment, the hearing on the criminal contempt conviction must satisfy due process standards for the severe punishment of disbarment. It is clear, however, that this hearing violated due

[15] A related question is raised by the finding of obstruction of justice based on petitioner's denial to Assistant District Attorney Scotti that he had made payments for Jack. The theory of the charge and the finding was that petitioner's misstatement impeded a grand jury investigation. On this theory, Scotti questioned petitioner, who was present pursuant to an informal request, when he was investigating the possibility of petitioner's participation in a crime but did not advise him of this fact and, consequently, did not alert him to his constitutional right to remain silent. The Fifth Amendment privilege would seem to require law enforcement officers to give this advice or be precluded from using any statements made as the basis of a charge or as evidence in any proceeding directed toward a punitive sanction. *Miranda* v. *State of Arizona*, 384 U.S. 436; cf. *Gouled* v. *United States*, 255 U.S. 298 (private papers obtained by stealth).

process requirements for proceedings resulting in serious punishments.

The Court has noted that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513, 520-521. It has held that the nature of punishment has an important bearing on procedural rights so that imprisonment for more than six months cannot be imposed without a jury trial. *Cheff* v. *Schnackenberg*, 384 U.S. 373; see *United States* v. *Barnett*, 376 U.S. 681. Accordingly, due process for the severe sanction of disbarment imposes more stringent standards than for the petty offense of contempt. For this reason, this Court's decision with respect to due process in *Ungar* v. *Sarafite*, 376 U.S. 575, for a minor penalty for contempt is not deemed controlling here with respect to the major punishment of disbarment.[16] Although lesser safeguards may be adequate for a relatively minor contempt punishment, due process with respect to the penalty of disbarment requires that before a criminal contempt conviction can be used as a basis for disbarment, the contempt proceeding must have provided at least a hearing before an impartial tribunal, the right of cross-examination, and the right to counsel. None of these procedural safeguards was accorded petitioner in the contempt hearing. *Cf. Isserman* v. *Ethics Committee*, 345 U.S. 927 (opinion of Mr. Justice Black).

The criminal contempt case was tried by the judge who preferred the charges, presented the evidence, and then

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[16] Petitioner's contempt punishment was characterized as "trivial" by Mr. Justice Goldberg in *United States* v. *Barnett*, *supra*, at 754. The sentence imposed was a fine of $250 and imprisonment for ten days which had already been served. Obviously, only a petty offense was involved. When this Court held, therefore, that the proceedings did not violate due process, it did so in the context of a petty offense and not the severe penalty of disbarment.

found petitioner guilty on the basis of his own charges and his own evidence. In addition, after being called upon to respond to lengthy charges on less than five days' notice, petitioner was required to go forward without counsel when the attorney with whom he appeared was granted permission to withdraw because an adjournment was denied. *Cf. Harris* v. *United States*, 382 U.S. 162.

(1) Impartial Tribunal.

Because fairness requires an absence not only of bias but even of the probability of unfairness, due process precludes a judge from trying a case in which he has an interest in the outcome and he will be deemed to have such an interest where he has preferred charges which are being tried. *Tumey* v. *Ohio*, 273 U.S. 510; *Offutt* v. *United States*, 348 U.S. 11; *In re Oliver*, 333 U.S. 257; *Cooke* v. *United States*, 267 U.S. 517; *Brown* v. *United States*, 359 U.S. 41. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison*, 349 U.S. 133, 137. Accordingly, for disbarment purposes, the trial judge's interest in conviction is established by the fact that he filed the contempt charges even if we assume, as the Court did in *Ungar* v. *Sarafite, supra*, that petitioner's statement that "the Court is suppressing the evidence" did not render the contempt personal to the judge.[17] Lack of impartiality is also evidenced by the fact that the judge asserted with respect to the statement that was the basis for the contempt conviction that petitioner was "not only contemptuous but disorderly and insolent". Moreover, the judge assumed the role of prosecutor, as well as judge, by presenting all the evidence introduced to prove petitioner's

[17] One can only speculate as to the trial judge's reason for denying petitioner any stay whatever for an application to the Appellate Division and directing the sheriff forthwith to imprison an attorney of 25 years' standing at the Bar.

guilt. Sitting in judgment on his own evidence, he found petitioner guilty.[18]

The importance of an impartial tribunal is emphasized by the subsequent events which demonstrated the very substantial basis for petitioner's charge that evidence was being suppressed. In the disciplinary proceeding, charges III and IV mirrored the three counts on which Jack was convicted, namely two counts of conflict of interest under Section 886 and one count of conspiracy to obstruct justice. The Referee's findings made clear, however, that two of the counts of which Jack had been convicted had not been sustained in the disciplinary proceeding. The Referee found that there had been no violation of Section 886 with respect to the 299 Broadway lease because it had been approved and executed before petitioner "even discussed with Jack the matter of financing the improvements in Jack's apartment". The Referee in effect found that the conspiracy charge similarly had not been proved by his finding that the agreement to conceal petitioner's payments, an essential ingredient of the proof of conspiracy, had been made for the single purpose of avoiding unfavorable publicity and that no thought had been given to any criminal investigation. The charge was sustained as to petitioner not on the basis of any conspiracy but on the ground that petitioner's misstatement in an informal interview in Scotti's office constituted an obstruction of justice.

The single count of which Jack was convicted which the Referee sustained as to petitioner was that the Riverside-Amsterdam project was a matter of business pending before the City in which petitioner was interested at the time of the advances for Jack. The extremely tenuous nature of this so-called "interest" is evidenced by the fact

[18] In *Nilva* v. *United States*, 352 U.S. 385, 402, four members of the present Court concurred in the dissenting view that it was wrong for the same judge "who preferred the charges of contempt on his own initiative and based on his own knowledge to sit in judgment on the accused."

that it was in a state of complete dormancy for approximately one year surrounding the time advances were made while a policy question involving the entire Title I program was being resolved by the Federal Administrator. During this period, nothing was pending before Jack or the Board of Estimate of which he was a member. It is difficult to believe that a jury in full possession of all the facts would have returned a verdict of guilty.

(2) Right of Cross-Examination.

The contempt hearing also deprived petitioner of the important right of cross-examination. In *Willner* v. *Committee on Character*, 373 U.S. 96, 102, 103, this Court stated, with respect to the denial of admission to the Bar, "the requirements of procedural due process must be met before a State can exclude a person from practicing law" and that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood". A crucial factor in the contempt determination was whether petitioner had been emotionally overwrought and under the influence of medication. The judge who tried the contempt conviction not only prejudged this issue by characterizing petitioner as a malingerer in the course of the Jack proceedings, but undoubtedly relied upon his own observation of petitioner in the Jack trial in adjudging petitioner guilty in the contempt trial. Presumably, he concluded from his personal observations that petitioner's distraught emotional appearance was feigned and that the medication of which the court had been informed did not contribute to his condition. But the judge's personal knowledge was not in evidence in the contempt trial and thus could not be the subject of cross-examination or rebuttal.[19] *Cf. Panico* v. *United States*, 375

[19] If the judge did testify, he would be in the position of evaluating as a judge the testimony he had given as a witness thus depriving the accused of the right to an impartial tribunal. *In re Murchison*, 349 U.S. at 138.

U.S. 1. "The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such a way". *In re Murchison,* 349 U.S. at 139.

(3) Right to Counsel.

Petitioner was effectively denied the right to counsel when he was required to proceed forthwith after his attorney withdrew upon being refused an adjournment. In *Chandler* v. *Fretag,* 348 U.S. 3, 10, the court pointed out "A necessary corollary [to the right to counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel". In view of the short period in which the contempt charges served upon petitioner were made returnable, it was not unreasonable to anticipate that an adjournment would be granted because of counsel's need to prepare his defense and his engagement in the trial of another case. Although it is unusual to refuse an adjournment in these circumstances and apparently contrary to the rules of the court, it is not contended here that this refusal was an abuse of discretion. But the refusal to grant petitioner any time at all to engage other counsel amounted to a denial of the right to counsel. "By denying petitioner any opportunity whatever to obtain counsel • • • the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment." *Chandler* v. *Fretag,* 348 U.S. 3, 10. See *Holt* v. *Virginia,* 381 U.S. 131, 136.

B. Aiding and Abetting Violation of City Charter.

The charge of aiding and abetting the violation of Sections 886 and 901 of the New York City Charter, which petitioner denied, is an indictable criminal offense[20] which does not involve professional misconduct or conduct related to the practice of law. Disbarment for this reason, therefore, is merely "the means of inflicting punishment

[20] See Penal Law, Secs. 2, 27 and 1936.

for a criminal offense in no way connected with the party's professional conduct" (Mr. Justice Field dissenting in *Ex Parte Wall*, 107 U.S. 265, 306). Thus, the punishment of disbarment which is more drastic than the statutory penalty,[21] is imposed upon petitioner upon a charge of criminal conduct unrelated to practice as a lawyer without the procedural safeguards of a criminal trial, and without the benefit of a jury to determine his guilt or innocence.[22] Where the only object is punishment, and where conduct related to the practice of law is not involved, it is submitted that it is a violation of due process to make a criminal charge the basis for disbarment without the procedural safeguards of a criminal trial, including the presumption of innocence and the required degree of proof.

The imposition of punishment "without a prior criminal trial and all its incidents" was held invalid in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167, when the Court construed the deprivation of nationality as a punishment, stating, "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."

C. Conspiracy to Obstruct Justice.

Procedural due process was also violated by failure to give proper notice when the Referee found that the charge of conspiracy to obstruct justice was sustained, although he made no finding of any conspiracy, on the ground that petitioner for the purpose of obstructing the administra-

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[21] Violation of the Charter provisions involves punishment for a misdemeanor and loss of the office held.

[22] Petitioner's request for a jury in the disbarment proceeding, as well as for a transfer of the proceeding to another department of the Appellate Division which had no previous contacts with the matters involved (e.g., appeals from the contempt conviction and the Jack appeals), was denied by the Appellate Division.

tion of justice gave false information to Assistant District Attorney Scotti. The Referee in effect formulated a new charge—intention to obstruct justice—at the conclusion of the hearing and found petitioner guilty of this charge without prior notice.[23]

It is clearly a denial of due process to predicate disbarment on a charge of which petitioner had no notice. Defending against the charge of intending to obstruct justice, essentially a mental state, is clearly different from defending against a charge of conspiracy to obstruct justice which requires overt acts. This is particularly true in the circumstances of the present case where a charge of intention to obstruct justice would be met by focusing on the fact that the misstatement was corrected on the first business day after it was made, that petitioner testified at length thereafter before the Grand Jury, and that Jack was convicted in a trial in which petitioner testified. Because of the charge of conspiracy, however, a focal point of the evidence was on the various meetings and conversations which preceded petitioner's misstatement which the Referee found were only directed toward avoiding adverse publicity for Jack and not to any criminal violations. *Cf. Morgan* v. *United States,* 304 U.S. 1, 18.

3. THE SEVERE PUNISHMENT OF DISBARMENT FOR THE CONDUCT CHARGED IS SO UNRELATED TO THE LEGITIMATE INTEREST OF THE STATE IN REGULATING THE PRACTICE OF LAW AS TO CONSTITUTE A DEPRIVATION OF DUE PROCESS.

The extreme penalty of disbarment imposed upon petitioner on the basis of conduct unrelated to the practice of law violates substantive due process because its severely punitive character is not reasonably related to the State's proper interest in regulating membership in the Bar. The punitive purpose of the disbarment order is highlighted by

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[23] Since the charge was specifically based on "Penal Law, Section 580" which requires a consipracy, the Referee's finding also has *ex post facto* implications.

the Referee's finding that petitioner has not been actively engaged in the practice of law since approximately 1958. But even if petitioner were an extremely active practitioner, it would be difficult to justify petitioner's disbarment on the basis of any legitimate regulatory interest.

Petitioner's professional conduct in the active practice of law for over 20 years was without blemish. The grounds for disbarment arise out of a single episode unrelated to professional conduct or to the practice of law not involving moral turpitude. The State cannot deny a person of membership in the Bar for reasons that do not have a rational connection to their fitness or capacity as practitioners. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232. "There is no showing of 'overriding and compelling state interest' (*Gibson* v. *Florida State Legislative Comm.,* 372 U.S. 539, 546) that would warrant intrusion" (*DeGregory* v. *New Hampshire Atty. Gen.,* 383 U.S. 825, 829) into petitioner's constitutionally protected right to remain a member of the bar. *Cf. Schware* v. *Board of Bar Examiners, supra; Willner* v. *Committee on Character,* 373 U.S. 96. The "requisite rational relation" between the severe punishment of disbarment and the proper objects of regulation of the practice of law is entirely absent. Cf. concurring opinion in *Trop* v. *Dulles,* 356 U.S. 86, 114.

Petitioner's conviction of contempt does not provide an adequate basis for disbarment. In *In re Isserman,* 345 U.S. 286, in which an attorney was disbarred as a result of a contempt conviction, Mr. Justice Jackson, in a strong dissent, stated (p. 292) that "We do not recall any previous instance * * * where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt." In the next term of court, upon petition for rehearing, the order of disbarment was set aside. *In re Disbarment of Isserman,* 348 U.S. 1. In *Sacher* v. *Association of the Bar,* 347 U.S. 388, a judgment of disbarment by a federal district court based upon a contempt conviction was reversed by this Court as

"unnecssarily severe" and remanded for further consideration. See also *Ex Parte Tillinghast,* 4 Pet. 108. In *Ex Parte Robinson,* 19 Wall. 505, an order disbarring an attorney for contempt was vacated on the ground that the statutory penalties provided for contempt negated all other types of punishment including disbarment. It is indeed shocking to the ordinary sense of justice and fair play to permit the drastic sanction of disbarment to be imposed as additional punishment in this case where the maximum statutory penalty permitted was a fine of $250 and imprisonment for thirty days. The separate charge that petitioner uttered the outburst that resulted in the conviction for criminal contempt provides no better basis for disbarment than the conviction itself.

The charge of aiding and abetting the violation of Sections 886 and 901 [24] of the City Charter is based on statutory prohibitions involving no moral turpitude. Neither an intent to influence nor influence in fact was an element of the statutory violation. Thus, it was possible to find that a loan made to a close friend of more than twenty years wholly unrelated to any official conduct was prohibited by the City Charter. The "interest" in a matter pending before the city was found in the Riverside-Amsterdam project which was dormant at the time awaiting resolution of general policy considerations by the Federal Government and which was under the principal jurisdiction of the Slum Clearance Committee. A statutory violation so tenuously and technically grounded hardly supplies a rational basis for disbarment. *Cf. Schware* v. *United States, supra,* at 242.

The charge of conspiracy to obstruct justice and administration of the City Charter was sustained although no conspiracy was found. The Referee found affirmatively that the only concerted action related to newspaper pub-

[24] Jack was acquitted of the violation of Section 901. Its inclusion in the charges against petitioner remains unexplained.

licity. Certainly, petitioner's isolated misstatement to an assistant district attorney, which was corrected almost immediately and prior to the convening of the Grand Jury, does not provide a reasoned basis for disbarment. *Cf. Schware* v. *United States, supra,* at 241.

This Court has taken notice on numerous occasions of the extreme severity of the punishment of disbarment and of the humiliation and disgrace which accompany it. "A removal from the Bar should, therefore never be decreed where any punishment less severe * * * would accomplish the end desired." *Bradley* v. *Fisher,* 13 Wall. at 355. This harsh sanction weighs so disproportionately against the charges sustained as to constitute a violation of substantive due process.[25]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
818 Eighteenth Street, N. W.
Washington, D. C. 20006
Attorney for Petitioners

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[25] If the statutes relied upon are construed to permit this result (Judiciary Law, Sections 750 and 751; Penal Law, Section 580; New York City Charter, Sections 886 and 901), they are unconstitutionally vague in violation of due process. *Winters* v. *New York,* 333 U.S. 507; *Thompson* v. *Louisville,* 362 U.S. 199; *Musser* v. *Utah,* 333 U.S. 95.

APPENDIX

APPENDIX

Opinion of the Appellate Division, January 18, 1966

In re Ungar

PER CURIAM

This is a disciplinary proceeding brought by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on November 4, 1935 in the Appellate Division, First Department. The charges are as follows:

"1. Respondent, on or about November 25, 1960, engaged in conduct, during the course of the trial of Hulan Jack, which resulted in his being found guilty of criminal contempt of court on or about December 13, 1960.

"2. During the course of the trial of *People* v. *Hulan E. Jack*, on or about November 25, 1960, respondent shouted at the court, while the court was in session and in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence.'

"3. Respondent, as a person doing business with the City of New York or interested in City contracts, aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter, and other provisions of law, by making gifts, loans or gratuities, or giving other things of value, to Hulan E. Jack, an official of the City of New York.

"4. Respondent conspired with Hulan E. Jack to obstruct justice and the administration of the New York City Charter, Sections 886 and 901, in violation of Penal Law, Section 580, and other provisions of law, by concealing certain payments to Fred Bechtel, or others, for work done on Jack's behalf in or about 1958, or for the benefit of Jack."

The findings of the Referee, George Trosk, Esq., sustaining the charges are amply supported by the record and his excellent and comprehensive report is confirmed.

The record shows the following facts to have been established. During February, March and April, 1958, Hulan E. Jack's apartment at 45 West 110th Street, County of New York, was renovated and redecorated. Jack was President of the Borough of Manhattan and a member of the Board of Estimate of the City of New York. Respondent supplied and paid the contractor, one Bechtel, for the work on Jack's apartment. During this period there was pending before the Board of Estimate the Riverside-Amsterdam project affecting the area in the Borough of Manhattan bounded by West 83rd and West 86th Streets, Amsterdam Avenue and the Hudson River. Respondent and his corporation sponsored the project. Jack has been found guilty of conspiring with the respondent to obstruct justice and the substantive crimes of accepting illegal gratuities by a public official in violation of section 886 of the New York City Charter. (*People* v. *Jack*, 12 N Y 2d 721.)

The arrangments for the work to be done by Bechtel were devious in that the estimate furnished to the respondent, a written direction for extra work authorized by respondent and a purported contract for the work falsely misdescribed the location of the work. The estimate referred to "55 East 110th Street"; the direction for extras and the contract specified "158 East 119th Street". The amount expended for the renovation and decoration of the Jack apartment was for the year 1958, treated by respondent's corporation as an expense in its income tax return. An amended tax return prepared in February, 1960 eliminated said item as an expense. At this time, however, respondent was aware of the Grand Jury investigation later resulting in the indictment of Jack.

Respondent in December, 1959 attended the office of the District Attorney of New York County. He initially

denied making payments for the work done at the Jack apartment and later recanted.

Between December 7 and 11, 1959 the date of respondent's initial appearance at the office of the District Attorney, the respondent, Jack, Bechtel and others formulated the plan to assert that payment for said work had been made by Jack or his wife. This plan followed an investigation commenced by a newspaper reporter; its avowed purpose was to avoid publicity unfavorable to Jack. The plan was in operation when Bechtel was served with a subpoena of the District Attorney and at the time respondent attended the office of the District Attorney.

Prior to December 11, 1959 respondent arranged for meetings with Bechtel, paid him the sum of $200 on account of the balance claimed by him for the work in the Jack apartment and persuaded Bechtel to agree to state that he was paid by Jack and not by respondent and to substantiate it by issuing receipts falsely acknowledging payments from Jack. The scheme aborted when Bechtel under subpoena attended before the District Attorney and informed him he had been paid by the respondent. Respondent was confronted by the District Attorney with the contractor's claim and recanted his prior denial of such payments.

The contempt underlying the second charge against the respondent occurred during the interrogation of the respondent during the second trial of Jack. Respondent was asked: "Q. When you told Mr. Jack that there was now a full scale investigation before the grand jury, what did Mr. Jack tell you?" Respondent first demurred to the question: "Well, that's only a small part of what I told him." Then respondent argued he was unable to state Jack's response because it was part of a half-hour conversation. Respondent asserted he was too upset and nervous and: "I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and

I can't testify under these circumstances." Respondent finally said: "I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The questions addressed to respondent were clearly proper. Defendant Jack did not urge the objections raised by the respondent. He assumed the role of both defendant and attorney.

The record, apart from respondent's declaration, is singularly devoid of evidence of a distraught, disoriented or irrational witness incapable of responsive answers; it establishes a deliberate course of conduct on the part of the respondent obstructive of the orderly and expeditious trial of the indictment against Jack. Respondent's contention that the contemptuous conduct was induced by medication intended to tranquilize but which, in fact, was an anti-depressant tending to exite and induce tremors is without substance. This ground was first advanced by respondent four years after the event.

Respondent called as his witness one of the assistant district attorneys present during the two Jack trials and the proceedings culminating in the conduct on which the contempt charge is based. He testified concerning respondent's conduct: "I observed you [respondent], and I believe from my observation it was deliberate."

Following the aforesaid testimony, respondent stated: "As a result * * * of [said] testimony * * * I will not call any of the witnesses that I have mentioned, or any of the other public officials whom I have subpoenaed, including the Mayor and Comptroller * * * and so forth."

The learned trial court found, and the record establishes, that the respondent's conduct was an extension of his con-

duct during the first trial of the Jack indictment during which he persistently ignored rulings, shouted, gesticulated and provoked incidents despite being admonished and cautioned on numerous occasions. Respondent was found guilty of contempt of court by the judge who presided at the trial. The contempt followed the criminal trial. (see *Ungar* v. *Sarafite*, 376 U.S. 575.)

A careful examination of the extensive record, exhibits and briefs fails to reveal extenuating circumstances. Respondent's conduct, activities and methods were clearly in violation of the ethical standards required of members of the Bar. (*Matter of Dougherty*, 7 A D 2d 163; *Matter of Lange*, 283 App. Div. 223.) Moreover, there is no indication of remorse of conscience or contrition.

Respondent's informal applications to reopen the proceedings to further examine Mrs. Safrin, a witness, and to adduce additional evidence and to reconsider our prior denials of similar relief are denied. Our examination of the record satisfies us that respondent has been afforded and availed himself of ample opportunity to address himself to and meet the relevant issues.

Respondent should be disbarred.

ALL CONCUR

Order of Appellate Division, April 21, 1966

The Association of the Bar of the City of New York, by Eric Nightingale, Esq., its attorney, having presented to this Court on the 25th day of September, 1962, a petition containing charges of professional misconduct against the above-named respondent, Sidney J. Ungar, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 4th day of November, 1935, at a term of the Appellate Division of the Supreme Court, First Judicial Department, and having petitioned the Court

to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorneys, Messrs. Rabinowitz & Boudin, and having interposed an answer to said petition, duly verified the 29th day of November, 1962, and the Court having duly made and entered an order on the 18th day of December, 1962, appointing George Trosk, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 22nd day of March, 1965, and was filed in the office of the Clerk of this Court on the 1st day of April, 1965;

And the petitioner thereafter and on the 18th day of January, 1966, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having cross-moved for an order disaffirming the Referee's report and dismissing the petition, and thereafter the respondent by letters dated February 11 and 17, 1966, with exhibits annexed thereto having renewed his application for leave to reopen the hearing before the Referee and the Petitioner having opposed same by letter dated February 15, 1966;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 2nd day of August, 1962, the affidavit of Eric Nightingale, Esq., annexed thereto, sworn to the 2nd day of August, 1962, the notice of presentation of said petition, dated the 22nd day of August, 1962, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 29th day of November, 1962, the order of this

Court, dated the 18th day of December, 1962, appointing George Trosk, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 18th day of December, 1962, the report of George Trosk, Esq., the Referee herein, dated the 22nd day of March, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 1st day of April, 1965, and upon reading and filing the undated notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, with proof of due service thereof, and the undated notice of cross-motion for an order disaffirming the report of the Referee and dismissing the petition, with proof of due service thereof; the letters of respondent dated February 11 and 17, 1966, with exhibits annexed thereto and the letter of the petitioner dated February 15, 1966, and after hearing Mr. John G. Bonomi for the motion to confirm the report of the Referee and Mr. Emanuel Redfield, and the respondent pro se, in opposition thereto and in support of the cross-motion to disaffirm the report of the Referee and to dismiss the petition; and due deliberation having been had thereon and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the application by respondent to reopen the hearings before the Referee is denied; and it is further unanimously

Ordered that the report of George Trosk, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 1st day of April, 1965, be, and the same hereby is, confirmed; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is disbarred from practice as an attorney and counselor-

at-law in the State of New York, effective May 23, 1966; and it is further unanimously

Ordered that the name of said Sidney J. Ungar be struck from the roll of attorneys and counselors-at-law in the State of New York, effective May 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another, effective May 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective may 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective May 23, 1966.

Order of Court of Appeals, July 7, 1966

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken as of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that there are no substantial constitutional questions directly involved.

Order of Court of Appeals, July 7, 1966

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

JOHN G. BONOMI
Attorney for the Association of the Bar of the City of New York, Respondent

MICHAEL FRANCK
Of Counsel

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 21, 1966, which disbarred petitioner. On June 30, 1966, the Appellate Division denied petitioner's motion to amend the order of disbarment to recite that constitutional questions were raised and necessarily passed upon. On July 7, 1966, the Court of Appeals of the State of New York denied petitioner leave to appeal and dismissed his appeal taken as of right upon the ground that no substantial constitutional question was involved.

STATEMENT OF THE CASE

Although a lengthy statement of the case is contained in the petition, respondent finds it necessary, in accordance with Rule 40(3) of the Revised Rules of this Court, to submit its own statement, particularly with reference to the events which took place on the weekend commencing Friday evening, December 11, 1959, and ending Monday, December 14, 1959. Petitioner's conduct during this period, which was fully considered by the Referee in his report, is essential to an understanding of the obstruction of justice charge.

The Conviction for Criminal Contempt

The Referee concluded that petitioner's conviction for criminal contempt, having been affirmed by the Court of Appeals, and by this Court, *Ungar* v. *Sarafite*, 376 U. S. 575, could not be retried. He recognized, however, that the question of guilt was distinct from the question before him and the Appellate Division of what discipline, if any, the conviction warranted. Noting that the record in the criminal contempt proceeding contained no evidence of any facts or circumstances which petitioner might have been able to adduce in defense or mitigation of his conduct (Report p. 100),[1] the Referee ruled that petitioner would be permitted to present any such evidence he could.[2]

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[1] Inasmuch as the petition does not refer to the pages of the Referee's report itself but to the page numbers of respondent's brief in the Appellate Division in which the report was printed as an Appendix, we do the same.

[2] The Appellate Division also refused to deny petitioner the right to call Judge Sarafite and Chief Assistant District Attorney Scotti as witnesses despite respondent's request that it do so. Petitioner nevertheless called neither (Report p. 101).

Petitioner testified that on the evening before the "outburst" which resulted in his conviction for criminal contempt, he had consulted a physician who prescribed certain pills. He further testified that he had taken 3 of these pills on the morning in question. The literature furnished by the manufacturer of these pills stated that a possible side effect could occasionally agitate the taker and result in hypermanic and manic episodes (Report p. 107). Petitioner testified that he did not learn of this possible side effect of the pills until the hearings before the Referee were in progress, some 4 years after the event (Min. p. 1966). The doctor who had prescribed the pills did not testify, having died some 2 years before the hearings (Report p. 107). Petitioner contended that immediately after the "outburst" he had gone to Beekman-Downtown Hospital where he was treated and received an injection (Report p. 108). No one from the hospital was produced before the Referee nor were any hospital records offered in evidence.

Petitioner called one witness present at the time of the "outburst", Assistant District Attorney Francis X. Clark. He testified that petitioner's conduct was deliberate (Report pp. 108-9).

The Referee reported that petitioner seemed to think he was entitled to use the witness stand to vindicate or exculpate himself in his own way, regardless of objections, not only by the court and the district attorney, but also by the attorney for the defendant who felt his client was being prejudiced by petitioner's lack of candor and frankness. The Referee also reported that petitioner frequently equivocated and fenced with the district attorney, first denying, and only when faced and pressed with prior testimony, reluctantly conceding that he had previously sworn dif-

ferently. Finally, the Referee reported that it was apparent from the proceedings preceding petitioner's contemptuous remarks that he was in full possession of his faculties and that there was no basis for finding that he spoke involuntarily or unintentionally. In this context, he noted that when the "outburst" occurred, petitioner's position, though voiced in language insolent and disruptive of the proceedings, was clearly, lucidly and coherently expressed, and though not legally sound, was rationally and sensibly stated from petitioner's point of view (Report pp. 109-10).

Aiding and Abetting Violation of the New York City Charter

Petitioner's payments for renovation of the apartment of Hulan E. Jack, then Borough President of Manhattan and a member of the Board of Estimate, were made in the period between January 1958, and April 1959 (Report p. 38). Prior to that time, petitioner had submitted to the City of New York a proposal for a Title I Slum Clearance Project in which, if it were approved, he expected to have a substantial interest as a 19% stockholder in the corporation which was seeking to be named sponsor (Report p. 42). The project and the sponsor would ultimately have to be approved by the Board of Estimate of which Jack was a member (Report p. 42).

On October 9, 1956, the Slum Clearance Committee gave its preliminary approval of the project and petitioner's sponsorship. In the Summer of 1957, the project was suspended and, in the Fall of 1957, petitioner was advised that his sponsorship would later be reviewed and reconsidered.

In July 1958, after petitioner's payments for the renovation of Jack's apartment had been made, his sponsorship was reconfirmed by the Slum Clearance Committee. The matter was thereafter to be passed upon by the Board of Estimate (Report p. 44).

The Referee concluded that throughout the period from 1956 to 1959, petitioner continued his efforts to have the project approved and his corporation designated as sponsor thereof by the Board of Estimate of which Jack was a member. Consequently, he found that petitioner was a person doing business with the City of New York and interested in city contracts within the meaning of then sections 886 and 901 of the New York City Charter which prohibited any officer or employee of the city to receive any gift, loan or thing or promise of value from any such individual (Report pp. 46-7).

Since the New York City Charter prohibited both, the Referee concluded that he need not determine whether the payments by petitioner on behalf of Jack were gift or loan (Report p. 38). However, the Referee did go into the question of petitioner's motive for the payments and his knowledge of their impropriety since that would have a bearing upon whether, and to what extent, discipline should be imposed (Report p. 39). In this context, the Referee reported on petitioner's extensive efforts to conceal his payments for the repairs in Jack's apartment.

The contractor, Fred Bechtel, testified that at the time the repairs in Jack's apartment were being discussed, petitioner had told him that this might be interpreted by others as a conflict of interest and that it was for that reason that he had used a false address on the original estimate

(Ex. 1; Min. p. 50) he prepared for the work in Jack's apartment. Bechtel further testified that at a later time petitioner had revealed to him that he was paying for the work in Jack's apartment because Jack could do many favors for him. The Referee noted that petitioner had admitted to the Grand Jury that he had told the contractor that Jack was in politics and probably could do many favors for him (Report pp. 47-8). In discussing the obstruction of justice charge, the Referee also noted that petitioner admitted having an understanding with Bechtel that he was not to reveal that petitioner was paying for the alterations in Jack's apartment (Report p. 52).

The payments by petitioner for the repairs in Jack's apartment were reported as leasehold improvements on the books of one of petitioner's corporations (Report p. 56) and were deducted on that corporation's income tax return for the year 1958 (Report p. 58).

Petitioner's office prepared and forwarded to Bechtel a contract (Ex. 2; Min. p. 67) covering the work at Jack's apartment, and a subsequent letter authorizing extra work (Ex. 3; Min. p. 63), both of which indicated that the repairs were to be made, not in Jack's apartment, but in a building owned by another corporation controlled by petitioner (Report pp. 60-1). This contract also falsely represented that Bechtel was doing the work for the corporation.

Petitioner and Jack, both of whom contended that petitioner's payments for the repairs were loans, denied any outstanding loans receiveable or payable, respectively, in documents signed by them subsequent to the payments by petitioner, although at the time no repayment had been made (Report p. 55).

The Referee also noted that when petitioner learned that the district attorney was looking into the matter of his payments for the work at Jack's apartment, he consulted an office associate, Harry Rosenblatt, Esq., concerning the applicability of the law of bribery and that, as a result of that conference, Rosenblatt examined the law dealing with "corrupt practices" as well (Report p. 49).

Obstruction of Justice

None of the documents concerning the repairs at Jack's apartment and petitioner's payments reflected the true circumstances (Report pp. 51-66). They indicated that the repairs were to be done at locations other than Jack's apartment; that the payments were for work other than that done in Jack's apartment; and that payments were made by corporations rather than by petitioner. Petitioner did claim that his first check to the contractor in the amount of $1000, was drawn on his special account and, therefore, disclosed that he had made the payment. That check, however, was neither produced before the Referee nor at the Jack trials. Moreover, petitioner's associate, Rosenblatt, testified that it was his recollection that the check had been drawn on one of petitioner's corporations and not on a personal account (Report p. 67).

Petitioner also contended that the true facts were reflected in a contract between Jack and the contractor (Ex. H; Min. p. 749). The contractor contended that he had never seen that contract. He stated that the only contract he had received for the repairs at Jack's apartment was the one which falsely recited that the work had been contracted for by one of petitioner's corporations and was to

be performed at a building owned by the corporation (Ex. 2; Min. p. 67). Petitioner produced his secretary who assumed responsibility for the preparation of the "inaccurate" contract (Ex. 2) and testified that she had advised petitioner of her mistake on December 14, 1959. On the very next day, December 15, 1959, petitioner in testifying before the Grand Jury, stated, when asked to explain the "inaccurate" contract, that he could not do so and theorized that one of the attorneys in his office might have made a mistake. The Referee noted that that testimony was inconsistent with the secretary's claim that she had made the mistake and so advised petitioner on the day preceding his testimony (Report pp. 61-5).

In this connection, the Referee also noted that the contract in Jack's name (Ex. H; Min. p. 749) which was produced by petitioner in the office of Chief Assistant District Attorney Scotti on the afternoon of December 11, 1959, set forth an agreed price of $3500, the exact amount of the false receipts (discussed *infra*) which Bechtel had prepared at petitioner's request that morning. This was significant since the "inaccurate" contract (Ex. 2), from which the secretary had testified she had copied the terms of the "Jack" contract (Ex. H), set forth the contract price as $3800 (Report pp. 64-5).

On May 15, 1958, the contractor, Bechtel, received from petitioner a check drawn on the same corporation named as a party in the "inaccurate" contract. On the back of that check, petitioner inserted a legend that payment was in full for all work done to date for all houses "under management or at management request". Although he contended that he had no knowledge of the "inaccurate" contract and that the work at Jack's apartment had nothing

to do with the corporation, petitioner interposed this check as a defense to a suit subsequently brought against him by Bechtel for a balance allegedly due for the work at Jack's apartment (Report p. 66).

After the district attorney's investigation had uncovered the fact that the entries in the books of one of petitioner's corporations showed the amount of the payments for the repairs at Jack's apartment as leasehold improvements on corporate property, the books were corrected. The minutes of the meeting of the board of directors (Ex. 12; Min. p. 2025) at which that was accomplished indicate that petitioner stated that the original entries had been erroneously made by the accountants of the corporation and that books, records and bills clearly indicated that petitioner had personally paid the contractor the amounts charged to leasehold improvements. This, the Referee concluded, was a deliberate misstatement since, in fact, there were no books or records or bills showing that petitioner had paid the contractor from personal funds (Report pp. 57-60).

In early December 1959, Bechtel was contacted by a reporter for the New York Post to whom he revealed that petitioner had paid for the Jack alterations (Report p. 67). On the following day, petitioner, from whom Bechtel had not heard for a period of over one year, telephoned the contractor, stated that he had been receiving telephone calls about the Jack job (referring to inquiries made of him by the New York *Post*) and requested to meet with him. An appointment was made for petitioner to come to Bechtel's home that evening (Report p. 68).

Petitioner sent his then partner, Norman Liben, Esq., to Bechtel's home in his place. Bechtel advised Liben that he had told the *Post* reporter that petitioner had paid him

for the repairs at Jack's apartment but that a balance of $1100 was still owing and that he had given the reporter certain documents concerning the work (Report p. 69). During this discussion between Bechtel and Liben, a telephone call was received from petitioner's former secretary, Rosalind Safrin, a personal friend of Bechtel. Mrs. Safrin arranged a meeting between Bechtel and petitioner for the following morning (Report pp. 69-70).

After leaving the contractor, Liben went to the home of petitioner's brother, as petitioner had instructed him to do. When Liben arrived, he found a conference in progress attended by petitioner, petitioner's wife, petitioner's brother and Hulan E. Jack. Liben reported what Bechtel had told him and it was then agreed that a false story would be concocted that Mrs. Jack had paid for the repairs from monies she had saved over a period of years from her household funds (Report pp. 70-72).

On the following morning, December 10, 1959, petitioner met with Bechtel and Mrs. Safrin. Petitioner asked and Bechtel agreed to make out false receipts showing that he had received payment from Mrs. Jack. Petitioner in turn agreed to pay Bechtel the $1100 which the contractor claimed was still due for the Jack job. Two hundred dollars of that amount was paid by petitioner at that meeting, the balance of nine hundred dollars was to be given to Mrs. Safrin to whom Bechtel would turn over the false receipts (Report pp. 73-4). On the following morning, Bechtel went to Mrs. Safrin's home and there made out four receipts (Exs. 6A, 6B, 6C, 6D; Min. pp. 379-380A), using different pens, each reciting the receipt "from Jack" of payment in the amount actually received from petitioner.

The false receipts were left with Mrs. Safrin for delivery to petitioner's wife (Report p. 75).

That afternoon, petitioner's wife asked Mrs. Safrin to come to her house to deliver the receipts but she was unable to do so (Report p. 76).

Sometime after leaving Mrs. Safrin's home, Bechtel was served with a subpoena requiring him to appear before the Grand Jury and to report to Mr. Scotti. Bechtel called petitioner and advised him that he had been served. Petitioner then called the district attorney's office to determine whether or not the paper served was in fact a Grand Jury subpoena. While waiting for an answer, petitioner turned the telephone over to Liben, his partner, who was advised that the contractor had indeed been served with a Grand Jury subpoena and had to appear in Mr. Scotti's office. Liben so advised petitioner (Report p. 78).

Petitioner then consulted his office associate, Rosenblatt, advised him about his "loan" to Jack for the alterations and asked him to look up the law. One of the things discussed was whether there was anything to implicate petitioner in bribery and Rosenblatt thereafter looked up various statutes pertaining to bribery and corrupt practices (Report pp. 78-9).

Bechtel did not immediately appear at petitioner's office to which he had stated he would come so that Liben, his then attorney, could accompany him to the district attorney's office. Consequently, Liben that afternoon telephoned the district attorney's office on two occasions to advise that Bechtel had not yet appeared. In one such conversation, he spoke to Scotti who told Liben that he should not represent Bechtel because there was a conflict of interest in-

volving his partner, petitioner. Liben advised petitioner of this conversation (Report p. 83).

Mr. Scotti suggested, in one of the conversations with Liben, that while they were waiting for Bechtel's arrival, petitioner should come over to his office. Liben so advised petitioner who then proceeded to the district attorney's office where he was interviewed by Scotti. At that time, petitioner falsely denied that he had anything to do with the payment for the repairs at Jack's apartment and that, as far as he knew, the payments had been made by Jack, Mrs. Jack or Jack's family (Report p. 81).

Bechtel ultimately arrived at Scotti's office with Liben and was also interviewed. He stated that he had been paid for the work by petitioner. When asked whether there were receipts, he stated that there were but did not explain that they were made out to "Jack" and not to petitioner. It was then late Friday afternoon and Scotti advised both petitioner, who was still present, and Bechtel that he wanted Bechtel to appear before the Grand Jury on the following Monday morning (Report p. 86).

After leaving Scotti's office, petitioner, Bechtel, Liben and Rosenblatt, who had also appeared at Scotti's office, returned to petitioner's office. The false receipts which Bechtel had prepared were discussed. Petitioner contended that he stated that the receipts were useless although, as the Referee noted, it is not clear why this should be so (Report pp. 86-7). Bechtel testified that he advised petitioner, in Rosenblatt's presence, that he had records at home which would show by whom and when the payments actually had been made and that he was then requested by Rosenblatt to bring them to petitioner's office on the

following morning when they were to be destroyed. Rosenblatt testified that no such conversation had taken place. The Referee noted that Rosenblatt had also denied knowing that Bechtel had been subpoenaed to appear before the Grand Jury on the following Monday although the subpoena was served in Scotti's office while Rosenblatt was present. The Referee concluded that if Bechtel's testimony concerning destruction of his records had been false, he would not have attributed it to Rosenblatt and thereby avoided the possibility of a denial by a disinterested person (Report pp. 87-8).

Petitioner and Bechtel left the office together and traveled uptown on the way to their homes. Bechtel testified that petitioner told him that he should consider that Jack had been in office for 20 years, should not hurt Jack's record, and should cooperate with him so that there would be no trouble (Report p. 89).

On the following morning, December 12, 1959, following a telephone call by petitioner to Mrs. Bechtel in which he advised that he was in the clear and that Bechtel should get himself a good lawyer, Bechtel proceeded to Mrs. Safrin's home to repossess the false receipts. Mrs. Bechtel took the receipts, tore them up and put them in her pocketbook. These torn pieces were turned over to Scotti later in the day when Bechtel decided to tell the full truth concerning the concocted story and the false receipts.

Jack testified that early on Saturday morning, December 12, 1959, petitioner had come to his home, told him that Mrs. Safrin had the receipts, that he had to get in touch with her, that he had told Scotti on the evening before that he had not made the payments to Bechtel, and that there

might be some trouble. Jack further testified that it was agreed that he and petitioner would continue to contend that the payments for the alterations had been made by Mrs. Jack (Report p. 93).

Jack denied that petitioner had in any way indicated that he would no longer participate in the concocted story, pointing out that petitioner had left his home for the avowed purpose of going to Mrs. Safrin to obtain the receipts (Report pp. 93-4).

While Bechtel was still at Mrs. Safrin's home, petitioner telephoned. He inquired about the receipts and was told they had been destroyed. Petitioner sounded hysterical and spoke to Bechtel, stating that he needed the receipts and that they should tell one story before the Grand Jury (Report p. 90).

Petitioner denied this conversation and contended that he had decided to tell the full truth and not participate in any further cover-up from the time that Scotti had served Bechtel with a Grand Jury subpoena on the previous afternoon. He denied that he had been of the opinion that if he, the contractor and Jack told the same story, the matter would be ended. He then admitted, however, that when he was questioned in Scotti's office, he was carrying out the same lie that was concocted at the meeting at his brother's home the Wednesday before and that he "figured" that if the contractor and he and Jack tell the same story, "that's the end of the whole business" (Report pp. 81-2).

Liben testified that petitioner called him at about noon on Saturday. Petitioner was practically hysterical and, in contrast to his attitude the evening before after leaving

Scotti's office, berated Liben for permitting Bechtel to implicate petitioner at Scotti's office on the afternoon of the previous day (Report p. 94).

Mrs. Safrin testified that she had been called to petitioner's home that Saturday evening and that, on the basis of her conversation with petitioner and his wife, she concluded that petitioner would very much like to have Bechtel change the statement he had given to Scotti the afternoon before (Report pp. 91-2).

Jack testified that on the following evening, Sunday, December 13, 1959, he met with petitioner at the home of his son. Petitioner stated that he was having difficulty and wanted to make sure that Jack's books would show his weekly payments to his wife from which it had been agreed it would be claimed she had saved the monies to pay for the alterations. Jack showed petitioner the records he had with respect to his payments to his wife for household expenses. When petitioner left, according to Jack, he was to continue his efforts to obtain false receipts (Report p. 94).

On the following day, Monday, December 14, 1959, Jack met with the District Attorney of New York County, Frank S. Hogan, and told him that Mrs. Jack had paid for the alterations. The Referee concluded that it was inconceivable that Jack would have persisted in the false story on Monday morning if petitioner had, as he claims, previously told him that he would not stand behind it and was going to tell the truth. The Referee noted that Jack's continued reliance on the false story on Monday was consistent with petitioner's testimony before the Grand Jury that his, petitioner's, decision to tell the truth had been made on Sunday

night (not on the preceding Friday as petitioner contended at the hearings) and that he had unsuccessfully tried to reach Jack on Monday morning to tell him (Report p. 95).

The Disciplinary Proceeding

Petitioner filed an answer to the charges instituted in the Appellate Division containing, as a fifth affirmative defense, a contention that inasmuch as he had testified before the Grand Jury and received immunity from prosecution, that portion of the disciplinary proceeding predicated upon his aiding and abetting Jack in violating the New York City Charter and conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. Respondent moved to strike all the affirmative defenses contained in the answer on the ground that they were insufficient as a matter of law. In an affidavit dated February 27, 1963, submitted in opposition to the motion to strike the affirmative defenses and in support of a cross-motion, petitioner's then counsel, Leonard B. Boudin, Esq., stated (para. 24, p. 9):

> "We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent,[3] upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal Constitutional privilege against self-incrimination."

[3] Petitioner here was the respondent in the Appellate Division.

The motion to strike was subsequently granted in all respects.

In seeking leave to appeal to the Court of Appeals of the State of New York, and in opposition to respondent's motion to dismiss his appeal as of right to that Court, petitioner made no reference to the fact that he had testified before a Grand Jury after having been granted immunity from prosecution and did not specifically refer to the fifth affirmative defense contained in his answer. In fact, in his affidavit of May 25, 1966, in support of his motion for leave to appeal, petitioner, in referring to the striking of his affirmative defenses, stated (p. 20), "Principally here involved are my Fourth and Sixth affirmative defenses, which pertain to the contempt charges".

Similarly, petitioner at no time contended, in either the Appellate Division or the Court of Appeals, that he was entitled to the standards of a criminal trial, including presumption of innocence or proof beyond a reasonable doubt, nor did he contend that he could be indicted under the applicable provisions of the New York City Charter. To the contrary, in his brief to the Court of Appeals in support of his motion for leave to appeal from the order of the Appellate Division disbarring him (p. 9), petitioner stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here"; and in the brief submitted by petitioner's counsel to the Appellate Division in opposition to the motion to confirm the report of the Referee (p. 10), petitioner stated that "The Charter provisions are *not* directed against the person who lends or gives the money" (emphasis not added).

POINT I

Petitioner abandoned any claim under the Fifth Amendment of the Federal constitution and, in any event, the privilege against self-incrimination is only applicable when the possibility of criminal prosecution still exists.

The principal ground advanced to support the petition for a writ of certiorari is the claim that petitioner's Fifth Amendment privilege against self-incrimination was infringed by the filing of disciplinary charges based on matters with respect to which his testimony before the Grand Jury was compelled by a grant of immunity (Pet. p. 22). This claim was first raised in the fifth affirmative defense contained in petitioner's answer to the petition instituting the disciplinary proceeding. It was, however, categorically abandoned by petitioner when, in an affidavit dated February 27, 1963 (p. 9), in opposition to respondent's motion to strike all the affirmative defenses, his counsel stated that, "in all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved". Consequently, the Appellate Division did not consider any claim under the Fifth Amendment's privilege against self-incrimination and did not pass upon it.

Having abandoned the contention in the Appellate Division, petitioner did not raise it in the proceedings in the Court of Appeals of the State of New York wherein he sought to appeal his disbarment as of right and by motion for leave to appeal. Thus, the petition for a writ of certiorari, in summarizing the arguments raised in the Court

of Appeals, does not refer to any claim arising under the privilege against self-incrimination (Pet. p. 21).

In these circumstances, it is respectfully submitted that the jurisdiction of this Court has not been preserved since it does not affirmatively appear from the record that the federal question here urged was presented to the State courts, *Lynch et al.* v. *N. Y. ex rel. Pierson,* 293 U. S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers,* 349 U. S. 458.

Petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand Jury also immunized him against any disciplinary proceeding is, moreover, totally without merit. Adoption of the proposition urged by petitioner would mean, for example, that an attorney who had bribed a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting the public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted. Such an astounding proposition finds no support in the Fifth Amendment or any of the decisions of this Court thereunder.

Boyd v. *United States,* 116 U. S. 616, and subsequent decisions of this Court which followed it, relied upon by petitioner (Pet. p. 23), are clearly distinguishable. As this Court noted in *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated. Consequently, if the

defendant were compelled to give testimony, he would be asked to provide evidence to establish the commission of crimes on his part for which he could thereafter be prosecuted since, unlike the present case, he had received no immunity from prosecution.

The applicability of the Fifth Amendment privilege against self-incrimination is, by its own terms, limited to situations where compelled testimony could be used in "any criminal case". Here petitioner had received immunity from any criminal prosecution. Consequently, immunity as broad as the privilege had been granted.

The privilege does not protect against the use of compelled testimony in disciplinary proceedings. These are civil rather than criminal in nature. Petitioner himself acknowledged this when, in his brief to the Court of Appeals of the State of New York in support of his motion for leave to appeal from the order of disbarment, he stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here". That disciplinary proceedings are essentially civil rather than criminal in nature was recognized by this Court as far back as 1882 when it so declared in *Ex Parte Wall*, 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The record discloses that petitioner was not misled concerning the extent of the immunity afforded to him before the Grand Jury. Thus, in response to the prosecutor's question at the Jack trial, petitioner conceded that it was his understanding that while he had received immunity from prosecution for crimes, he had not received immunity from any "disbarment proceeding" that might be instituted (Pet. Ex. 11, p. 321; Min. p. 1734).[4]

POINT II

Petitioner was afforded full due process with respect to the charges predicated upon his conviction for criminal contempt.

This Court specifically held that the requirements of due process were satisfied in the course of the criminal contempt proceeding which resulted in petitioner's conviction, *Ungar* v. *Sarafite,* 376 U. S. 575, 589. These, the Court noted, included the right to be adequately advised of the charges, a reasonable opportunity to meet the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses.

The Referee concluded that the fact of the conviction and its affirmance precluded him from conducting a retrial of the charge that petitioner had been guilty of criminal contempt. By this he meant, of course, that he could not

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[4] Significantly, the petition cites the question but not petitioner's answer (Pet. p. 8). Petitioner argues that the asking of the question demonstrates that his disbarment was in the mind of the prosecuting attorney from the very outset. This is sheer speculation and, in any event, irrelevant. Since petitioner was a prosecution witness, the question was apparently asked in front of the jury to indicate that petitioner had substantial motive to minimize the impropriety of the conduct in which he engaged with the defendant, Hulan E. Jack.

reverse the Appellate Division, the Court of Appeals of the State of New York and this Court. He did not, however, as the petition implies (Pet. p. 26), hold that the conviction itself automatically provided grounds for petitioner's disbarment. Quite to the contrary, the Referee stated that he was prepared to receive in evidence any facts or circumstances which petitioner might be able to adduce in defense or mitigation of his conduct with reference to the question of what discipline, if any, the conviction warranted (Report p. 100). Over the vigorous protest of respondent, the Referee indicated that he was even prepared to allow petitioner to call Judge Sarafite, before whom the criminal contempt had taken place and who had convicted petitioner therefor, as well as Chief Assistant District Attorney Scotti who conducted the prosecution of the case in which the criminal contempt occurred. Nevertheless, petitioner called neither (Report p. 101).

Petitioner called only one of the persons who was present at the time of the events which led to his conviction, Assistant District Attorney Francis X. Clark. Clark testified that petitioner's conduct on the occasion in question was deliberate (Report pp. 108-9).

The medical evidence adduced by petitioner was extremely limited. It consisted solely of literature which indicated that certain pills which petitioner had been taking on the morning in question *might* have a side effect which could agitate the taker. Petitioner sought thereby to create the inference that he had in fact suffered such a side effect. However, his own testimony discounted that possibility, since he acknowledged that he did not even suspect such a side effect and did not learn of it until the hearings be-

fore the Referee were in progress, some 4 years after the event (Min. p. 1966).

Of utmost significance in this context, is the fact that although petitioner contended that immediately after the "outburst" he had received medical attention at a hospital (Report p. 108), in the course of which his actual physical condition at the time was presumedly observed, he produced neither hospital records nor testimony from anyone at the hospital.

The Referee nevertheless examined the record of petitioner's testimony at the Jack trial on days when he concededly was not taking the pills in question to determine his state of mind at the time of the "outburst". Citing prior clashes between petitioner and the Court and the District Attorney, the Referee concluded that there was no evidence of any marked change in petitioner's demeanor at the time of the "outburst". Consequently, there was no evidence that the remarks constituting the contempt had been involuntarily or unintentionally uttered (Report pp. 109-10). The Referee reported that petitioner had not presented any justification or adequate excuse, mitigation or extenuation of his conduct (Report p. 111).

The Referee's conclusion in this regard is completely consistent with that reached by this Court, which found that the pattern of petitioner's conduct which culminated in the events for which he was convicted began at the very outset of the trial, *Ungar* v. *Sarafite, supra,* at 576-79.

It is clear, in any event, that petitioner was afforded all of the elements of due process referred to in the petition in the course of the disciplinary proceeding. The Referee was completely impartial, having had no prior contact

whatsoever with the Jack case or the proceedings leading to petitioner's conviction. Petitioner was afforded the right to cross-examine adverse witnesses and to call any witness who, in his judgment, had relevant testimony. Finally, petitioner had full right to counsel and was, in fact, represented at the outset of the proceedings but, for reasons of his own, discharged his attorney prior to the hearings and conducted them *pro se*.

POINT III

Petitioner erroneously contends that his conduct in aiding and abetting a violation of the conflict of interest provision of the New York City Charter could have resulted in criminal charges against him.

Petitioner argues that the charge against him in the disciplinary proceeding predicated upon his aiding and abetting a violation of the conflict of interest provisions of the New York City Charter alleged a crime on his part and that, consequently, he was entitled to the standards of proof and presumption of innocence applicable in criminal cases (Pet. pp. 31-2).

In the first place, this contention is here raised for the first time. Petitioner effectively so concedes for, in summarizing the points raised by him in the Court of Appeals, he himself does not contend that this contention was presented (Pet. pp. 21-2). Moreover, the contention itself is predicated upon an erroneous interpretation of the relevant statute. The conflict of interest provisions of the New York City Charter involved are Sections 886 and 901 (since renumbered) of the Charter. The relevant portions of their text is set forth in the petition (Pet. pp. 3-4). It will be

noted that by their very terms these statutory provisions are directed solely to officers and employees of the City of New York who are therein forbidden to accept any gratuity, loan or other thing of value from persons interested in city contracts or whose interest may in any way be affected by the official action of the officer or employee in question. These statutes are in no sense directed to the persons who offer or pay such gratuities, loans or other things of value. Consequently, there is absolutely no basis for petitioner's contention that he could have been subjected to criminal prosecution for his participation in the violation of these provisions which occurred when Hulan E. Jack, then Borough President of Manhattan, accepted a loan or gift from him. To the contrary, in the brief submitted by petitioner's counsel to the Appellate Division in opposition to the motion to confirm the report of the Referee (p. 10), petitioner stated that "the Charter provisions are *not* directed against the person who lends or gives the money" (emphasis not added).

It being clear, therefore, that the conduct underlying this charge could not under any circumstance have subjected petitioner to criminal prosecution, it follows that his argument that he should have been entitled to criminal standards predicated upon that assumption must fall. Thus, petitioner himself advised the Court of Appeals in his brief in support of his motion for leave to appeal from the order of disbarment (p. 9) that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here".

It does not follow, in any event, that merely because certain alleged conduct could be the basis for criminal prosecution, all proceedings involving consideration of such con-

duct must be conducted under criminal standards. Thus, for instance, conversion of funds may subject the taker to both criminal prosecution and a civil suit for recovery of the funds involved. Yet, no one would contend that in the civil suit, the alleged taker is entitled to either the presumption of innocence or proof beyond a reasonable doubt.

POINT IV

Petitioner's participation in a scheme to obstruct justice was fully established by the evidence and the Referee so found.

By the simple expedient of ignoring all but one paragraph of the forty-five pages of the report (Report pp. 50-95) devoted to the charge that he conspired to obstruct justice, petitioner argues that the Referee did not find this charge established. The relevant portions of the report are summarized at pages 7-16 of our Statement of the Case, *supra*. It reveals the following conduct on the part of petitioner:

On December 11, 1959, petitioner learned that Bechtel, the contractor he had paid for the repairs at Jack's apartment, had been served with a Grand Jury subpoena. Petitioner thereupon consulted an office associate, Rosenblatt, told him about the monies he had paid on behalf of Jack and discussed the possible applicability of the law of bribery. As a result of that conference, Rosenblatt looked up the law, including statutes pertaining to "corrupt practices". On the basis of that evidence, in part brought out by Rosenblatt, petitioner's own witness, the Referee concluded that petitioner's denial that he knew that a Grand Jury investigation was in progress and that he himself

later proceeded to the District Attorney's office solely for the purpose of discussing matters other than the Jack case "is patently untrue" (Report p. 83).

At the time petitioner learned that Bechtel had been served with a Grand Jury subpoena, he knew that all records and documents pertaining to the Jack job concealed the true facts. He also knew that all those having knowledge of the true facts surrounding the repairs at Jack's apartment had agreed to tell a concocted story that Mrs. Jack had paid for the repairs out of monies she had saved from her allowance for household expenses. Petitioner also knew that, at a meeting on the previous day, Bechtel had agreed to prepare false receipts to substantiate this concocted story. Petitioner's wife, sometime on the afternoon of the day that Bechtel was served with the subpoena, called Mrs. Safrin, with whom the false receipts had been left, to obtain delivery.

With that knowledge in mind, petitioner proceeded to the office of Chief Assistant District Attorney Scotti and there falsely denied that he had had anything to do with the payments for the repairs at Jack's apartment and that, as far as he knew, Jack, Mrs. Jack or a member of Jack's family had made the payments. He acknowledged that he was carrying out the concocted story previously agreed upon and felt that if everyone told that story the matter would be ended.

While petitioner was still present in Scotti's office, Bechtel appeared and was interviewed. Scotti then advised petitioner that there was a conflict between his and Bechtel's version of the events and that Bechtel would have to reappear on the following Monday to testify before a Grand Jury.

Petitioner then returned to his office together with Bechtel who was asked to produce all of his records concerning the Jack job on the following morning so they could be destroyed. Rosenblatt, to whom Bechtel attributed the statement that the records would be destroyed, denied that he had said anything of the kind, but the Referee did not credit his denial (Report p. 88).

On the following morning, December 12, 1959, petitioner went to Jack's home where he stated that Mrs. Safrin had the false receipts and was going to get in touch with her to obtain them. Jack testified that it was then agreed that both he and petitioner would continue to assert the concocted story.

Thereafter, petitioner telephoned Mrs. Safrin and spoke to Bechtel, who had gone to her house to reclaim the false receipts, having decided not to further participate in the concocted story. Upon hearing that the false receipts had been destroyed, petitioner urged Bechtel to go along with him and to make out new receipts so that they could all tell one story before the Grand Jury.

Sometime thereafter, petitioner telephoned his then partner, Liben, who had accompanied Bechtel to Scotti's office on the previous day, and hysterically berated him for having permitted Bechtel to implicate him in the course of the interview at Scotti's office. It is significant to note this very pronounced change of attitude on petitioner's part after he learned that the false receipts were no longer in existence. Thus, on the previous evening, after leaving Scotti's office, petitioner gave no indication that he was upset at Liben although he then already knew what Bechtel had told Scotti (Min. p. 591).

On the evening of December 12, 1959, Mrs. Safrin was asked to come to petitioner's home where it was suggested that she explain to Bechtel that he had not yet made any statement under oath and if he would change his story to conform to that previously agreed upon, there would be no trouble.

On the following day, December 13, 1959, petitioner met with Jack and told him that he was having difficulty. Petitioner wanted to be certain that Jack's books would show his weekly payments to his wife to support the concocted story and Jack showed him the relevant records in his possession. Jack stated that when petitioner left on that occasion, it was understood that he was to continue his efforts to get false receipts.

Petitioner vigorously denied Jack's testimony and contended that he had abandoned the concocted story on December 11, 1959, upon leaving Scotti's office. In rejecting that contention, the Referee noted that it was inconceivable that Jack would have related the concocted story to the District Attorney of New York County on December 14, 1959, as he in fact did, if he had then known that petitioner was not going to support it. What Jack did in repeating the concocted story on December 14, 1959, the Referee stated, was consistent with petitioner's own testimony before the Grand Jury that his decision to tell the truth had been reached on Sunday night, December 13, 1959, and that he had been unable to reach Jack the following morning before Jack spoke to the District Attorney (Report p. 95).

It is respectfully submitted that this extensive discussion of the evidence relating to this charge and the Referee's finding with respect thereto clearly demonstrates that the

Referee found the charge to have been established. If, as petitioner contends, the Referee merely found that he had made a false statement to Scotti, no such discussion, or conclusions that petitioner's claims were untrue, were necessary. Petitioner had at all times conceded that his statement to Scotti was untrue.

Similarly, if the Referee intended to limit his finding to petitioner's false statement on December 11, 1959, there was absolutely no purpose to his lengthy consideration of conversations and meetings participated in by petitioner on the evening of December 11, 1959, on December 12, 1959 and on December 13, 1959, after he had left Scotti's office (see, for example, Report pp. 86-8, 93-95).

Moreover, the report itself demonstrates that the Referee was fully aware of the nature of the charge before him. Thus, he begins his forty-five page discussion of the evidence by correctly referring to the charge as one of "alleged conspiracy to obstruct justice and the administration of New York City Charter" (Report p. 50).

POINT V

Disbarment for the conduct established does not violate due process.

Having strenuously contended that the four charges underlying his disbarment cannot be isolated from each other (Pet. p. 22), petitioner reverses his position and proceeds to consider each charge separately (Pet. pp. 34-5) to support his claim that the extent of discipline violated due process. Thus, for example, petitioner argues that his conviction for criminal contempt itself does not provide an adequate basis for disbarment. He cites Mr. Justice Jackson's dissent in *In re Isserman,* 345 U. S. 286, 292. His reliance upon the *Isserman* case is misplaced. In the first place, the proceeding against Isserman was predicated solely upon a contempt conviction and did not involve, as does the present case, additional charges of misconduct, the existence of which Mr. Justice Jackson indicated (at 294) would have substantially affected his views. Moreover, the *Isserman* case involved this Court's supervisory power over disciplinary proceedings in the federal courts, a power permitting standards far different than those applicable to review by this Court of disciplinary proceedings in state courts. Thus, this Court denied Isserman's petition for a writ of certiorari to review his disbarment by the New Jersey courts for the very same contempt conviction, *Isserman* v. *Ethics Committee of Essex County Bar Association,* 345 U. S. 927.

In the instant case, the reasonableness of the discipline imposed must be considered in light of the charges sustained by the Appellate Division. We respectfully submit

that the disbarment by a state court of an attorney guilty of 1) criminal contempt of court without extenuating or mitigating circumstances; 2) aiding and abetting a violation of the conflict of interest provisions of a local law concerning the operation of municipal government; and 3) participating in a scheme to obstruct the administration of justice by efforts to conceal the true facts from a law enforcement agency and to promote acceptance of a concocted story; is, on its face, not so unreasonable as to provide any basis for a claim that due process has been violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

December, 1966

Respectfully submitted,

JOHN G. BONOMI
Attorney for the Association of the Bar of the City of New York, Respondent

MICHAEL FRANCK
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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APPENDIX 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Counsel for respondent Bar Association have inexplicably pressed to the limits of advocacy in their effort to discourage on wholly extraneous considerations review by this Court of petitioner's claims of constitutional violations. Displaying the prosecutorial fervor that since 1959 has permeated the various proceedings which had their origin in the *New York Post's* journalistic vendetta,[1] they would thus finalize the disbarment of an attorney

[1] The notoriety of the events of which the disbarment proceedings are a part is evidenced by the large, prominent headlines which were generated by each episode of the unfolding drama. Petitioner's disbarment on the complaint of the District Attor-

with an unblemished record of some 25 years at the Bar. The punitive aspects of the disciplinary proceeding are highlighted by the fact that petitioner, who in recent years has been preoccupied with real estate transactions and prominently identified with philanthropic organizations (R. 111), has not been an active practitioner for almost a decade.

Respondent's superficial discussion of the constitutional questions presented by the petition suggests that it has been unable to discover substantive reasons for opposing it on the merits. Nevertheless, adopting the role of zealous prosecutor, it vigorously opposes the petition in the following manner: (1) Without controverting petitioner's statement, it devotes half its brief to recounting disputed occurrences which are irrelevant to any issues for the obvious purpose of attacking his character and persuading the Court that he is a person whose claims of constitutional violations should not be considered regardless of their merit. (2) It omits reference to very significant material in the record in erroneously advancing the argument that petitioner has abandoned the important claim that his constitutional privilege against self-incrimination has been violated. And (3), without discussion of statutory and decisional authority directly pertinent to the question, it cavalierly and incorrectly asserts that the charge of aiding and abetting the violation of the city charter did not charge petitioner with a criminal violation.[2]

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ney, which was forecast by the prosecuting attorney at the very beginning of the story (Pet. p. 8, n. 4), is the denouement of the story. Photocopies of illustrative headlines are incorporated in the appendix to this brief.

[2] Respondent also argues there was no violation of due process in connection with the charge of conviction of criminal contempt.

1. Charge of Conspiracy To Obstruct Justice.

The petition claims a denial of procedural due process in the finding that the charge relating to the statutory crime of "conspiracy" to obstruct justice was established without a finding of conspiracy (Pet. pp. 32-33). Although carefully avoiding a direct statement that the Referee found any conspiracy (Resp. Br. pp. 26-30),[3] respondent argues "that the Referee found the charge to have been established" and embarks upon an "extensive discussion of the evidence relating to this charge" for the purported purpose of demonstrating that the Referee so found (Resp. Br. pp. 2, 6-16, 26-30).

The alleged conspiracy, as defined by respondent's bill of particulars, was clearly rejected by the Referee's specific findings, as well as his omission to make a finding of conspiracy.[4] Respondent's extended recital of petitioner's alleged "conduct" cannot be justified, therefore, on the ground that it shows that the Referee made a finding of a conspiracy. The obvious purpose of this detailed elaboration of unfounded disparaging insinuations is to prejudice the consideration of petitioner's claims of violations of his constitutionally protected rights. The

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[3] Respondent also appears to be avoiding the direct claim of conspiracy which it suggests by innuendo. For example, it states that a description of certain events "is essential to an understanding of the obstruction of justice charge" (Resp. Br. p. 2) and discusses this subject in its Statement of the Case under the caption "Obstruction of Justice" (Resp. Br. p. 7). It should be noted that respondent refers to "obstruction of justice" and not *conspiracy* to obstruct justice despite the fact that the charge is based upon a "violation of Penal Law, Section 580" which relates to conspiracy and that obstruction of justice does not appear to be a statutory crime in New York.

[4] The fact that the "Referee was fully aware of the nature of the charge before him", as evidenced by his "correctly referring to the charge as one of 'alleged conspiracy to obstruct justice'" (Resp. Br. p. 30), contrary to respondent's contention, demonstrates that his omission of any finding of conspiracy was deliberate.

falsity of these charges was clearly demonstrated in petitioner's Supplemental Brief filed in the Appellate Division. Since they are irrelevant to the issues here, petitioner will not join in respondent's diversionary tactic by debating their inaccuracy at this time.

Charge IV was that petitioner "conspired with Hulan E. Jack to obstruct justice and the administration of the New York City Charter by concealing certain payments to Fred Bechtel" on Jack's behalf. Petitioner's demand for a bill of particulars in the disciplinary proceeding dated November 15, 1962, requested respondent to state the following (par. 7):

> (d) From whom is it claimed that the respondent conspired to conceal certain payments to Fred Bechtel and others, that is - from a District Attorney, a Grand Jury, a court or otherwise?

Respondent's bill of particulars, dated December 5, 1962, answered as follows (par. 7):

> (d) A District Attorney or representatives thereof and others not presently known to the petitioner.

The bill of particulars thus makes clear that the conspiracy alleged related to concealment by petitioner's misstatement to Scotti since there is no particularization of the conspiracy to obstruct justice by concealing the payments from the grand jury. This was clearly understood by the Referee whose report states that "the most important" respect in which petitioner was charged with having obstructed justice was his misstatement to Scotti (R. 82). The concluding paragraph of the Referee's report with respect to this charge relies entirely on this misstatement to Scotti on the afternoon of December 11 (R. 95). Thus, the first sentence in this paragraph reads as follows (R. 95):

> In my opinion, respondent [petitioner here], for the purpose of obstructing and defeating the administration of justice, willfully and knowingly gave

> Assistant District Attorney Scotti false information concerning important and material facts involved in a grand jury investigation.

In the following and concluding sentence of this paragraph, making clear that his conclusion that the charge was established was based on this statement, the Referee stated (R. 95):

> Consequently, in my opinion, this charge has been established.

Respondent's claim that this misstatement to Scotti resulted from a conspiracy with Jack to obstruct justice is rejected by the Referee's finding that as late as the meeting of Wednesday evening, December 9th, the only matter considered was adverse publicity and that "there is nothing to indicate" that at that time any thought had been given to the possibility that petitioner's loan to Jack "might result in any criminal investigation, proceeding or prosecution."[5] Respondent does not challenge the statement in the Petition (p. 21) that "There is no evidence, and no suggestion by the Referee, of any subsequent agreement to tell this story for any other purpose when petitioner, on Friday, December 11th, denied to Assistant District Attorney Scotti that he had made the payments for Jack." The finding of the Referee that the agreement reached at the meeting on December 9th was related only to the avoidance of unfavorable publicity for

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[5] The full quotation from the referee's report with respect to the meeting on the evening of December 9, 1959, is as follows (R. 72):

> The only thing discussed at this meeting was publicity, i.e., what "cover-up" story could be prepared for use if the Post should break the story as Bechtel had given it to Haddad. There was no mention of, or reference to, the District Attorney, or to the possibility that any crime was involved, or to any grand jury investigation, and there is nothing to indicate that up to this time, at least, anyone thought that the transaction between respondent and Jack might result in any criminal investigation, proceeding or prosecution.

Jack is equivalent, therefore, to a finding that petitioner's statement to Scotti on December 11th was not a part of any conspiracy to obstruct justice. [6]

The Referee's detailed narrative of events following petitioner's awareness of a criminal investigation does not contain a finding of a subsequent conspiracy to obstruct justice. Respondent's speculation as to the purpose of the Referee's "lengthy consideration of conferences and meetings participated in by petitioner" after his meeting with Scotti (Resp. Br. p. 30) is no substitute for a finding of conspiracy which the Referee did not make. [7] If petitioner is to be disbarred for having conspired to obstruct justice, a finding of conspiracy should be unequivocally clear. It should not be clothed in terms of a finding of obstructing justice — a charge of which petitioner had no notice.

2. Petitioner Did Not Abandon Claim of Violation of Self-Incrimination Privilege.

Respondent asserts that petitioner "categorically abandoned" the claim of a violation of his privilege against self-incrimination by his counsel's statement on February 27, 1963, that it did not appear "that the self-incrimination provisions of the Federal Constitution are

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[6] Nothing in the referee's report intimates that petitioner had any knowledge of the possibility of a criminal investigation before the Friday afternoon, December 11, 1959, when he made the acknowledged misstatement to Scotti. Quite obviously none of the events which preceded this knowledge, even if accurately described by respondent, could be part of a conspiracy to obstruct justice. Respondent's sham excuse for its protracted exposition with respect to this prior period is thus laid bare.

[7] Respondent argues that petitioner's claim that the referee made no finding of conspiracy ignores "all but one paragraph of the forty-five pages of the report (Report pp. 50-95) devoted to the charge" (Resp. Br. p. 26). The fact is that in these 45 pages the referee makes no finding resembling one of conspiracy and not once in the text of this 45-page discussion uses the word "conspiracy".

involved" and that there were grounds for "striking out the reference to the Federal Constitutional privilege against self-incrimination" (Resp. Br. p. 18). Respondent's argument appears somewhat disingenuous in light of the full context of the statement, subsequent pleadings filed by petitioner renewing the claim, and the course of the decisions of this Court with respect to the applicability of the privilege against self-incrimination to State proceedings.

Violation of petitioner's self-incrimination privilege, based upon the filing of disciplinary charges concerning matters with respect to which his testimony before the grand jury was compelled by a grant of immunity, was claimed in the Fifth Affirmative Defense in petitioner's answer to the charges. The statement upon which respondent relies was contained in an affidavit filed in opposition to respondent's motion to strike petitioner's affirmative defenses and appears to be less an abandonment of the claim than a concession that, phrased in terms of self-incrimination rather than due process, it did not appear to have merit, presumably, because at that time the self-incrimination provisions of the Federal Constitution had been held inapplicable to State proceedings. But the affidavit did not acquiesce in "striking out the reference to the Federal Constitutional privilege against self-incrimination." In the following sentence, not quoted by the bar association, the affidavit continued: "We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent [petitioner here] to amend the answer by adding the words 'under the State Constitution and his right to due process of law under the Federal and State Constitutions.'"

Petitioner's continued reliance on violation of due process because of charges based on matters with respect to which he had been granted immunity is clear. The fifth affirmative defense claimed not only a violation of his constitutional privilege against self-incrimination but also "his right to due process of law". The affidavit

upon which respondent relies for its claim of abandonment stated that, although the self-incrimination provisions of the Federal Constitution did not seem to be involved, "the right to federal due process is involved." In view of this Court's decision more than a year later in *Malloy v. Hogan*, 378 U.S. 1, that the self-incrimination prohibitions of the Fifth Amendment with respect to the Federal Government are applicable to the States through incorporation in the Fourteenth Amendment, petitioner's reliance upon the Fourteenth Amendment with respect to the impropriety of basing charges upon matters with respect to which he had been granted immunity can hardly be considered an abandonment of the claim.

In any event, any lack of confidence which petitioner may have expressed with respect to protection against self-incrimination under the Federal Constitution would obviously be justified under this Court's decision in *Twining v. New Jersey*, 211 U.S. 78; *Adamson v. California*, 332 U.S. 46; and *Cohen v. Hurley*, 366 U.S. 117. It was not until June 15, 1964, in *Malloy v. Hogan, supra*, that this Court held the standards of the self-incrimination provisions of the Fifth Amendment applicable to the States. In the circumstances, it would be difficult to find a voluntary waiver or abandonment of this important constitutional right on the basis of acknowledged doubts as to the validity of the claim. "There is a presumption against a waiver of constitutional rights * * * and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'". *Brookhart v. Janis*, 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights is indulged (*Johnson v. Zerbst*, 304 U.S. 458, 464; *Glasser v. United States*, 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 384 U.S. 436, 475) have obviously not been met.

The speciousness of respondent's argument is demonstrated, moreover, by petitioner's reiteration of the claim both in the Appellate Division and in the Court of Appeals after its alleged abandonment. Petitioner filed in the Appellate Division a notice of motion and affidavit dated April 22, 1963, seeking leave to appeal to the New York Court of Appeals from the order of the Appellate Division entered on March 21, 1963, striking petitioner's affirmative defenses. The notice of motion set forth as a question for review "Whether the granting of immunity to respondent [petitioner here] by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding". A supporting affidavit stated that "the questions involve matters * * * of constitutional law (5th affirmative defense)" and prayed leave to appeal upon the questions of constitutional law set forth in the fifth affirmative defense.

In the Court of Appeals, petitioner's affidavit in support of his motion for leave to appeal from the order of disbarment specifically refers to the affirmative defenses set forth "as paragraphs 6 through 27 of my answer in this disciplinary proceeding." (p. 20) The fifth affirmative defense which claims violation of the privilege against self-incrimination under the Federal Constitution is set forth in paragraphs 19 and 20 which are embraced in the paragraphs to which petitioner's affidavit made specific reference. Although petitioner stated that the fourth and sixth affirmative defenses were "principally" involved in the motion for leave to appeal, he did not indicate that he relied on them "exclusively" and clearly, therefore, did not exclude his reliance on the fifth affirmative defense. The reluctance of petitioner to place particular stress on the fifth affirmative defense involving the privilege against self-incrimination under the Federal Constitution is readily understandable in light of the Court of Appeals' decision in *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457, certiorari granted, 382 U.S. 942, which affirmed an order of the Appellate Division,

Second Department, disbarring an attorney upon his refusal to testify and produce his records in reliance upon the privilege against self-incrimination under the Federal Constitution.

An affidavit verified June 7, 1966, in support of a "motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States, viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the courts held that they were not," quoted the portions of the affidavit just discussed filed in the Court of Appeals relating to striking of the affirmative defenses in petitioner's answer. It seems clear, therefore, this constitutional claim was not, as respondent asserts, "categorically abandoned" in an affidavit dated February 27, 1963.

3. Criminal Contempt Conviction as Basis for Disbarment.

Respondent's assertion "that petitioner was afforded all of the elements of due process" in connection with the charge of conviction of criminal contempt, based upon the referee's statement that he had an opportunity in the disciplinary proceeding to present evidence in defense or mitigation of his conduct (Resp. Br. p. 22), is contradicted by the referee's report and the confirming decision of the Appellate Division.

Respondent's argument completely disregards the fact that there were two separate and distinct charges in the disciplinary proceeding which related to petitioner's conduct in the second Jack trial. The first charge was that during the course of the Jack trial petitioner engaged in conduct "which resulted in his being found guilty of criminal contempt of court on or about December 13, 1960." The second charge was that on or about November 25,

1960, in the course of the Jack trial, petitioner "shouted at the court, while the court was in session and in the immediate hearing and presence of the jury" the utterance which was the subject of the contempt conviction.

The referee dealt with each charge separately and made separate conclusions with respect to each charge. As to the charge of conviction of criminal contempt, he described the course of the contempt proceeding through various courts including this Court (R. 96-98) and concluded, "Accordingly, this charge is established as a matter of law" (R. 97). With respect to the second charge based upon the utterance itself, after reviewing in some twelve pages of his report the events at the Jack trial and the evidence in the disciplinary proceeding (R. 99-110), the Referee stated that petitioner "admits having uttered the language attributed to him in the charge, as amended, and that he shouted it at the Court, while the Court was in session, and in the immediate hearing and presence of the jury." The Referee concluded that "The charge is, accordingly, admitted" and that petitioner had not presented any adequate justification or excuse for his conduct (R. 110-111). It was only in connection with the second charge that the referee stated that petitioner was afforded an opportunity to present evidence in defense or mitigation of his conduct. No such opportunity was presented with respect to the first charge which was regarded to be established as a matter of law. The Appellate Division similarly set forth the two charges separately (App. 1a)[8] and confirmed the findings of the Referee sustaining the charges (App. 2a) which, as we have seen, dealt with the two charges separately. Its opinion specifically relies on the criminal contempt conviction, stating that petitioner "was found guilty of contempt of court by the judge who presided at the trial" (App. 5a).

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[8] These references are to the Appendix to the Petition.

As the petition pointed out and as Mr. Justice Harlan noted in his memorandum of September 30, 1966, relating to the stay of the disbarment order, the Appellate Division "did not explicitly discriminate among the grounds upon which its disbarment order was based"; the effect of each charge with respect to the disbarment order, therefore, cannot be separately measured (Pet. p. 22). Thus, there is no basis for concluding that a disbarment order would have resulted if there had been no conviction of criminal contempt and no charge in the disciplinary proceeding based upon this conviction. Whether or not the outcome in the disciplinary proceeding would have been the same if petitioner's utterance alone was the subject of a charge is a matter of pure speculation.

Furthermore, treating the charge of conviction of criminal contempt as established as a matter of law had the effect in the disciplinary proceeding of casting upon petitioner the burden of proving that his conduct, already conclusively presumed to be contemptuous, might be excused by extenuating circumstances. Thus, the proponent of the charges in the disciplinary proceeding offered no witnesses to carry the burden of proving de novo that petitioner's conduct was contemptuous or to establish the circumstances of the utterance. Instead, the contempt was considered to have been established and the burden was thrust upon petitioner to prove justification or mitigation.[9] The contempt conviction was, therefore, a sig-

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[9] Petitioner's fourth affirmative defense which was stricken by the Appellate Division attempted to put in issue the correctness of the contempt conviction by alleging that the statements to the court which were the subject of the contempt conviction were made when petitioner was under unusual pressure from the court and from counsel for both parties and was in a highly emotional state, and further asserted that the statements made were true, setting forth the bases upon which this assertion was made. The Appellate Division's denial of another effort of petitioner to deal with the contempt conviction charge by taking certain depositions is described in petitioner's affidavit in support of his motion in the Court of Appeals for leave to appeal from the order of disbarment as follows (pp. 22-23):

nificant factor in the disciplinary proceeding. But, as the petition points out, vital aspects of procedural due process for any punishment other than for a petty offense of criminal contempt were lacking.

4. Aiding and Abetting Violation of City Charter.

The petition urges that, since disbarment is the means for inflicting punishment for a criminal offense not related to professional conduct, due process requires the procedural safeguards of a criminal trial. Respondent contends that petitioner has not raised this issue before, that aiding and abetting violation of the City Charter provisions is not a criminal charge, and that the due process procedural safeguards for the imposition of criminal sanctions do not apply to civil proceedings.

Although petitioner did not previously urge in precise terms that he was entitled to the procedural safeguards of a criminal trial, he did raise the issue of due process under the Federal Constitution on numerous occasions in contexts which clearly implied that the charge of aiding and abetting violation of the City Charter should be treated as criminal in nature. In his Fifth Affirmative Defense, petitioner asserted that the institution of the disciplinary proceeding on the basis of this charge vio-

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By order to show cause dated September 6, 1963, supported by affidavit of same date, application was made on my behalf to take the depositions of Mr. Justice Sarafite, District Attorney Hogan and Assistant District Attorney Scotti, in advance of the Referee hearings. This was another effort on my behalf to place the matter in what I respectfully deemed to be the appropriate context and setting of fairness in light of my contention that the disciplinary charges were the outgrowth of a basic miscarriage of justice against me done during the course of the Hulan Jack trials and my own resultant conviction for contempt before Mr. Justice Sarafite. The application referred to was denied by the Appellate Division on December 17, 1963.

lated his right to due process of law because of the grant of immunity. His brief filed in the Appellate Division in opposition to the referee's report alleged this charge "is created ad hoc for this proceeding" and "that such post facto tailoring does not comport with elementary due process" (p. 18). In the brief filed in the Court of Appeals in support of his motion for leave to appeal from the order of disbarment, petitioner argued that the burden of proof in disciplinary proceedings "is one lying intermediately between the burden applied in a civil forum and that applied in a criminal forum," that the "exacting manner" in which the burden of proof was applied reflected "the solicitude with which Anglo-American jurisdictions have traditionally regarded the right of a licensed attorney or counsellor to pursue his profession in a proper manner" (p. 9), that in disciplinary proceedings there is "a distinctive requirement of judicial proof" which "is in a significant degree more exacting than the conventional standard of 'preponderance' applied generally in civil cases" (p. 10), and that construction of the facts to establish a violation of the charter renders "those statutes constitutionally void on account of vagueness" (p. 25).[10]

Respondent's claim that aiding and abetting the violation of sections 886 and 901 of the New York City Charter is not a criminal offense disregards express statutory provisions to the contrary. Although the charter provisions declaring the prohibited conduct a misdemeanor are directed solely to officers and employees of

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[10] In petitioner's affidavit filed in the Court of Appeals in support of his motion for leave to appeal, petitioner noted that he had "urged that the disciplinary charges be dismissed on the ground that the statutes upon which they were based were constitutionally void on account of vagueness," requested the appointment of an advisory jury, and asserted "due process unconstitutionality (on account of vagueness)" of the New York City Charter provisions (pp. 21, 27).

the City, other provisions of the New York Penal Law, which are referred to in the petition (Pet. p. 31, n. 20), make it a crime for any person to aid or abet the commission of a misdemeanor.[11] Respondent does not explain why these statutory provisions are inapplicable or even take note of them. Nor does it discuss the decision of the New York Court of Appeals in *People v. Brody*, 298 N.Y. 352, 83 N.E. 2d 676, 679, involving a comparable situation, in which the court stated:

> Nor does it matter that Auditore, not being a public official, could not, on his own account, have committed a crime under section 1826. As an aider and abettor of Brody, who was of the class of persons who could commit the crime as defined in the statute, Auditore, too, could be held as a principal. Penal Law, § 2; * * *.

It prefers to rely upon the authority of petitioner's statement on another occasion that the charter provisions are directed to the City officials and not to the person who gives a loan or gratuity to them.

With respect to the applicability of due process safeguards pertinent to criminal sanctions,[12] this Court has

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[11] The text of these provisions follows:

Section 2: "Principal. A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission * * * is a 'principal'."

Section 27: "A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal and may be indicted and punished as such, if the crime be a misdemeanor."

Section 1936: "When an act or omission is declared by statute to be a misdemeanor, and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who aids or abets another in such act or omission is also guilty of a misdemeanor."

[12] It should be noted that petitioner's claim to procedural due process for criminal proceedings is made with respect to the limited circumstance in which disbarment is chosen as the

recognized that disbarment is equivalent to criminal punishment (see Pet. pp. 23-25) and that constitutional standards are determined by the nature of the proceeding and not by its denomination as "civil" or "criminal". *Trop v. Dulles*, 356 U.S. 86; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. The relevance of the standard of proof to the severity of the sanction was recently reiterated in *Woodby v. Immigration and Naturalization Service*, Nos. 40 and 80, this Term, decided December 12, 1966.[13]

Respectfully submitted,

MORTON LIFTIN
818 Eighteenth Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner

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means for imposing punishment for a criminal offense which is not related to the practice of law; it is not urged as a general rule for disciplinary proceedings.

[13] Although the case was decided on nonconstitutional grounds, the decision is not without due process implications. Cf. *Kennedy v. Mendoza-Martinez*, *supra*.

IT'S UP to the GOVERNOR

An Editorial on Page 45

WEATHER
Rain tonight and tomorrow. Low tonight near 40.

New York Post

BLUE ★★ EDITION

TWO SECTIONS 88 PAGES | NEW YORK, FRIDAY, DECEMBER 18, 1959 | Volume 199 No. 28 | 10 Cents

JURY CALLS JACK

Page 3

DAILY NEWS
NEW YORK'S PICTURE NEWSPAPER
5¢
Vol. 41. No. 151 Copr. 1950 News Syndicate Co. Inc New York 17, N.Y., Friday, December 18, 1950 WEATHER: Cloudy, some rain, mild.

JACK AND UNGAR BOTH EXPLAIN: IT WAS A LOAN

Borrowing Trouble. Manhattan Borough President Hulan Jack refers to Sidney J. Ungar for corroboration of his statement to the press in latter's office at 350 Broadway. Both insisted that the $5,500 remodeling job in Jack's apartment financed by Ungar was a loan. No collateral or promissory note was posted.

—Story on page 3

BIG 4 TALKS START

See Page 2

WEATHER
Saturday: Clear & windy, in 40s.
Sunday: Fair & cold.
Story THE WEATHER DETECTIVES

New York Post

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THREE SECTIONS 48 PAGES • NEW YORK, SUNDAY, DECEMBER 20, 1959 Volume 159 No. 29 10 Cents

WEEK-END ★★ EDITION

EXCLUSIVE

BARE 2D UNGAR, CITY DEAL

New York Post

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Re-entered as 2nd class matter Nov 22 1943, at the Post Office at New York under Act of March, 3, 1879

TWO SECTIONS 64 PAGES · NEW YORK, MONDAY, DECEMBER 21, 1959 · Volume 159 No. 30 · 10 Cents

BLUE ★★ EDITION

JACK GOING BEFORE GRAND JURY

Townsend Marries Belgian Girl

Peter Townsend, 44, and Marie-Luce magne, 20, were married today in a ceremony in a Brussels suburb. Story,

Story P. 3; Editorial, P. 39; Jackie Robinson, Back Page, and Mrs. Roosevelt, P.

THE PRESIDENT'S TRIP

Story P. 5; Editorial P. 21; Barry P. 22

WEATHER
Fair, cold, 20s. Tomorrow: Cloudy chance of snow, 30s.
FROM THE WEATHER BUREAU

New York Post

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TWO SECTIONS · 40 PAGES NEW YORK, WEDNESDAY, DECEMBER 23, 1959 Volume 159 No. 32 10 Cents

BLUE ★★ EDITION

It Hit 9.8!—White or Wet Yule Due

Story on Page 2

JACK DUE BACK WITH RECORDS

Page 3

3C

Associated Press Wirephoto

The Big Bankroll," as
yhood pal of gambler

on Causes sile Scare SAC Base

, Dec. 7 (AP) — The Air Command said to-moon fooled electronic gadgetry into flashing ng of a missile attack. quick check proved the d there was no alert of worldwide bomber and force, a spokesman said. reviously unreported in-

Bar Assn. Unit To Get Ungar Testimony

By DAVID GELMAN and TED POSTON

District Attorney Hogan announced today that he was sending the trial testimony of real estate operator Sidney J. Ungar in the conflict-of-interest case of Manhattan Borough President Hulan E. Jack to the Grievance Committee of the Bar Assn.

Hogan said he would apply also to a General Sessions Judge tomorrow for the release of Ungar's testimony before the grand jury which indicted Jack last January to forward to the Bar Assn.

Adverse action by the association could lead to disbarment of Ungar, who is a lawyer as well as a realtor.

Earlier today, General Sessions Judge Sarafite, told reporters that he would "take action" in Ungar's case "as soon as I can get to it." During the trial, the Judge warned Ungar to keep himself "available" at the conclusion of the case.

Sarafite indicated during the trial that he might cite the realtor for contempt of court as a result of several emotional outbursts on the witness stand.

Scramble On for Job

Those developments came on the heels of an all-out scramble for Jack's $25,000-a-year job, despite the fact that there was some doubt as to when a successor could replace him.

cial forfeits his position "upon The City Charter says an offi-conviction," but some lawyers maintain that despite last night's guilty verdict the conviction is not official until Judge Sarafite passes sentence on Jan. 16.

SIDNEY UNGAR

sible 3-year jail term and fines up to $1,500.

The jurors told The Post that

Judge Pins Contempt Notice On Ungar Trial Performance

By NEAL PATTERSON

Sidney J. Ungar, realty pal of convicted Manhattan Borough President Hulan Jack, became the target of contempt action yesterday for his conduct on the stand during Jack's conflict-of-interest trial.

General Sessions Judge Joseph A. Sarafite filed papers late yesterday directing Ungar, who is also an attorney, to show cause at 10 A.M. next Tuesday why he should not be punished for contempt.

Called Him Hostile

Judge Sarafite had characterized Ungar as a hostile witness during the trial because, in the judge's opinion, he over-answered or sought to dodge many questions asked about his $4,000 payment for the remodeling of Jack's apartment.

One of three counts on which Jack was convicted was that Jack had conspired to obstruct justice by conniving with Ungar and others to tell a false story about Ungar's financing of the Jack apartment job.

Judge's Motion Quoted

Judge Sarafite bolstered his contempt motion with 27 pages of testimony given by Ungar on Nov. 22, 23 and 25.

It was evident from the beginning of his testimony, the judge charged, that Ungar had "embarked on a course of conduct designed to obstruct the orderly trial of the case."

Sidney J. Ungar
Called insolent, and more

Ungar, Sarafite continued employed "a loud, disorderly, contemptuous and insolent manner" and knowingly and willfully persisted in refusing to follow rulings and instructions of the court.

The wayward witness, the judge said, culminated his performance by shouting: "I am absolutely unhonor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence."

Could Get 30 Days

If found guilty of contempt, Ungar could get 30 days, a $250 fine, or both.

Ungar also faces possible disciplinary action by the Bar Association. District Attorney Hogan is preparing to submit Ungar's grand jury and trial testimony to the association's grievance committee.

Jack, now awaiting sentence Jan. 16, automatically forfeited his $25,000 office, under specifications of the City Charter, when a jury convicted him Tuesday.

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New York Post

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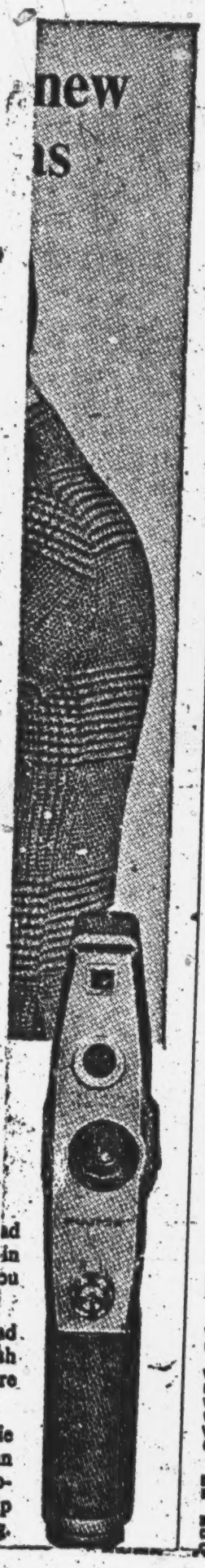
NO PRISON TERM FOR HULAN JACK

Judge Blasts Him, Suspends Sentence



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Appellate Unit Disbars Hulan Jack's Nemesis

By HENRY LEE

Sidney J. Ungar, the lawyer and real estate dealer who was a key figure in the scandal involving Manhattan Borough President Hulan Jack half a dozen years ago, was ordered disbarred yesterday.

The Appellate Division, acting on findings by Referee George Trosk, made the order effective May 23.

Convicted for Contempt

In disciplinary proceedings, Ungar was charged with conduct resulting in a criminal contempt conviction by Justice Joseph A. Sarafite, who presided at Jack's trial in Supreme Court in 1960, on conflict of interest charges.

"I am being coerced and intimidated," Ungar assertedly shouted at the court in the presence of the jury. "The court is suppressing the evidence."

Sidney J. Ungar
In brief, he's through

Ungar also was charged with conspiring with the former borough president to obstruct justice by concealing payments Ungar made to a painter for work done at Jack's apartment, then at 45 W. 110th St.

Jack was found guilty of allowing Ungar to pay for the $4,400 remodeling and lost his job. During that period, the court noted, a housing project on Manhattan's West Side was pending before the Board of Estimate.

10 Days in Jail

Ungar served 10 days in jail and paid a $250 fine after being cited for contempt during the trial.

Aside from the one outburst, the Appellate Division said, the trial record "is singularly devoid of evidence of a distraught, disoriented or irrational witness incapable of responsive answers." Rather, the court found "a deliberate course of conduct" to obstruct an orderly, expeditious trial.

The Appellate Division dismissed Ungar's claim that tranquilizing medicine had been to blame and found his "conduct, activities and methods" all "clearly in violation of the ethical standards required of members of the bar."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 751

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MORTON LIFTIN
818 Eighteenth Street, N. W.
Washington, D. C. 20006

Attorney for Petitioner

[Charge of Conspiracy to Obstruct Justice]

DEMAND FOR BILL OF PARTICULARS, NOVEMBER 15, 1962

Respondent, by his attorneys, RABINOWITZ & BOUDIN, in order adequately to file his Answer and to prepare his defense herein, hereby requests a bill of particulars setting forth the following:

* * *

7. With respect to Paragraph IV, subdivision 4, state the following:

* * *

(d) From whom is it claimed that the respondent conspired to conceal certain payments to Fred Bechtel and others, that is - from a District Attorney, a Grand Jury, a court or otherwise?

* * *

BILL OF PARTICULARS, DECEMBER 5, 1962

Petitioner, without conceding the basis or the authority for the demand in a proceeding of this nature, submits the following for its bill of particulars in response to demand dated November 15, 1962, and served November 19, 1962:

* * *

7. * * *

(d) A District Attorney or representatives thereof and others not presently known to the petitioner.

* * *

[Claim of Violation of Self-Incrimination Privilege]

RESPONDENT'S [PETITIONER HERE] ANSWER TO CHARGES

* * *

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE LIMITED TO PARAGRAPH "IV-"3" and "4" OF THE PETITION:

19. Respondent testified before a Grand Jury with respect to the matters set forth in the said paragraphs. When respondent sought to waive his immunity, permission to do so was refused by the District Attorney on the ground that such waiver could not be given as a matter of law.

20. Respondent submits that the institution of the instant disciplinary proceeding on the basis of the matters set forth in Paragraph "IV", subdivisions "3" and "4", is a violation of his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. * * * (pp. 8-9.)

* * *

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, FEBRUARY 25, 1963

* * *

THE FIFTH AFFIRMATIVE DEFENSE

* * *

24. We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal constitutional privilege against self-incrimination. We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words "under the State Constitution and his right to due process of law under the Federal and State Constitutions." * * * (p. 9.)

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL AND AFFIDAVIT, APRIL 22, 1963

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leonard B. Boudin * * * the undersigned will move this Court at a term of the Appellate Division of the Supreme Court of the State of New York, First Department, for an order granting leave to the respondent to appeal to the Court of Appeals from said order of the Appellate Division, First Department, entered on the 21st day of March, 1963 in the Office of the Clerk of the Appellate Division, First Department * * * and for the certificate

of the said Appellate Division certifying the questions of law decisive of the correctness of its determination and that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, to wit, whether in disciplinary proceedings instituted in the Appellate Division upon a petition of a bar association, the respondent may not assert the following matters in the form of affirmative defenses:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 1-2.)

* * *

AFFIDAVIT

* * *

5. The issues raised by these affirmative defenses are important to the law governing disciplinary proceedings. The questions involve matters * * * of constitutional law (5th affirmative defense) * * *. (p. 2.)

* * *

WHEREFORE, your deponent prays for an order granting respondent leave to appeal to the Court of Appeals upon questions to be certified by this Court as follows:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 3-4.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, MAY 25, 1966

Before taking up in further detail the findings and rulings of the Referee and the Appellate Division, I shall briefly enumerate the several motions and applications which were made on my behalf prior to, during and after the Referee proceedings, insofar as pertinent to the issues for appeal in this Court: The first item of the aforementioned category which needs to be mentioned is a motion which was commenced by the petitioner Bar Association, and which I unsuccessfully contested, for the striking of affirmative defenses in answer. I refer to the petitioner's motion dated January 8, 1963, supported by affidavit of Michael Franck, Esq., sworn to on the latter date. The affirmative defenses in question appear as paragraphs 6 through 27 of my answer in this disciplinary proceeding. Principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges. (pp. 19-20.)

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND DISBARMENT ORDER, June 7, 1966

I respectfully submit this affidavit in [support] * * * of my presently pending motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the Courts held that they were not.

* * *

[Aiding and Abetting Violation of City Charter]

RESPONDENT'S [PETITIONER HERE] BRIEF IN OPPOSITION TO MOTION TO AFFIRM REFEREE'S REPORT

* * *

In concluding the observations on Charge III, respondent urges that as a matter of law there is no provision in the Charter relating to aiding and abetting the violation of Section 886. Nor does Section 901 refer to such actions. Consequently, this charge against the respondent is created *ad hoc* for this proceeding in the hope that the court will find substance to it. We submit, however, that such *post facto* tailoring does not comport with elementary due process and is a serious distortion of the rights of respondent. No legal or moral wrong existed at the time on respondent's part. Why should one now be created? (p. 18.)

* * *

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT

* * *

The fair meaning of the cases in this State, on the question of burden of proof in disciplinary proceedings against attorneys is, we submit, that the burden is one lying intermediately between the burden applied in a civil forum and that applied in a criminal forum. Although the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here, the decisions reveal that the rule requiring proof of the charges of misconduct by a preponderance of evidence is applied in a distinctively exacting manner, reflecting the solicitude with which Anglo-American jurisdictions have traditionally regarded the right of a licensed attorney or counsellor to pursue his profession

in a proper manner, and the recognized need of protecting attorneys and counsellors against ill-considered or intemperate official charges. * * * (p. 9.)

* * *

We submit that the emphasis in the above cases on the issue of the "intentional" character of an attorney's conduct, and on the need for "clear" or "satisfactory" evidence, bespeaks, as we suggested, the prevalence, in disciplinary proceedings, of a distinctive requirement of judicial proof that it is in a significant degree more exacting than the conventional standard of "preponderance" applied generally in civil cases. (p. 10.)

* * *

* * * To construe the within legislative provisions [Sections 886 and 901] as having placed an attorney on "notice" or "apprisal" that he would be deemed in violation upon making a loan for purely friendship reasons to a City official at a time when the alleged matter of "interest" in "City business" was thus in a dormant condition, is to render those statutes constitutionally void on account of vagueness. Moreover, such a construction and application of the statutes, in regard to the Riverside-Amsterdam item, is also violative of substantive due process in the even more fundamental sense above mentioned, i.e., in that the statutes are thus given a construction and an application which bears no "reasonable relation" to the legitimate legislative object of regulating the conduct of attorneys. (p. 25.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, May 25, 1966

By motion on my behalf supported by affidavit sworn to April 24, 1963, it was urged that the disciplinary charges be dismissed on the ground that the statutes upon which they were based were constitutionally void

on account of vagueness; and requesting the appointment of an advisory jury under C.P.L.R. 4212. As to the point of statutory vagueness, we urged that, since the Supreme Court of the United States had determined, in affirming my 1960 contempt conviction (375 U.S. 809) that constitutional issues which I raised as to the validity of Judiciary Law §§ 750 and 751 on due process grounds as construed and applied had not been raised in the courts of this State, the within disciplinary proceedings would present for the first time the question of the constitutionality of those statutes. It was also urged in the aforementioned motion that we were entitled to dismissal of the disciplinary proceeding on the ground of due process unconstitutionality (on account of vagueness) of §§ 886 and 901 of the New York City Charter and § 580 (Conspiracy) of the Penal Law as construed and applied herein. * * *.(pp. 21-22.)

* * *

* * * The Referee's finding that I was interested in the Riverside-Amsterdam project (*id.*, pp. 9-17) was arrived at on the basis that, although this project had evidently been approved originally by all officials concerned on an entirely objective and proper basis, and although Mr. Jack's dealings with me in relation to this project had betrayed no impropriety aside from the technical "conflict of interest" impingement deemed to arise from my having given Mr. Jack loan assistance for the renovation of his apartment, and although also there had been a hiatus in the Riverside-Amsterdam project which I contended rendered this subject matter immaterial to Charge III, and which I contend makes the Statute unconstitutional as vague and indefinite, the sheer fact that I had (admittedly) given Mr. Jack the loan-assistance while the Riverside-Amsterdam project continued to be within the purview of my hopes or possible expectancy, was sufficient to sustain Charge III. * * * (p. 27.)